Supreme Court, U.S.
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No. 10-549

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In the Supreme Court of the United States

JEFFREY HOLIBAUGH,

Petitioner,

v.

ROBB EVANS & ASSOCIATES, LLC, as Receiver over the Assets of Andris Pukke and DebtWorks, Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mitchell J. Rotbert
THE ROTBERT LAW GROUP, LLC
9710 Traville Gateway Drive, No. 246
Rockville, Maryland 20850
(240) 876-3046
mrotbert@rotbertlaw.net

Counsel for Petitioner

Dated: October 25, 2010

THE LEX GROUP[DC] ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether Congress in enacting 28 U.S.C. § 1367 overruled *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895), which hold (or have been interpreted to hold) that a receiver appointed by a federal district court always has jurisdiction in that court to commence a civil action on claims of any nature, regardless of the absence of a statutory basis for the district court's jurisdiction over such claims?

2. Whether the Supreme Court should expressly overrule *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895), which this Court implicitly overruled in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005) and *Kokkonen v. Guardian Life Ins. Co of America*, 511 U.S. 375, 377 (1994)?

3. Whether *Peacock v. Thomas*, 516 U.S. 349 (1996) allows as a "proceeding" within the "ancillary enforcement jurisdiction" of a federal district court a separate civil action commenced by a receiver appointed by that court?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fourth Circuit is reported at 609 F.3d 359 (4th Cir. 2010). The Fourth Circuit denied a timely petition for panel rehearing and for rehearing *en banc*. Appendix 87a. The Fourth Circuit affirmed the decision of the United States District Court for the District of Maryland, which is unreported and reproduced at Appendix 20a

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was rendered on June 29, 2010. The Petition for Panel Rehearing and for Rehearing *En Banc* was denied on July 27, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article III, Section 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . -- to controversies . . . between citizens of different states . . . .

Title 28 United States Code, Section 1367

Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Title 28 United States Code, Section 1332

Diversity Jurisdiction; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

* * *

Title 28 United States Code, Section 1331

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 United States Code, Section 754

Receivers of property in different districts

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

Title 28 United States Code, Section 959

Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The provisions of the Act of March 3, 1891, 26 Stat. 826 ("Evarts Act"), 15 U.S.C. § 52, 15 U.S.C. § 53, 15 U.S.C. § 77v(a), 15 U.S.C. § 78aa, and the balance of 28 U.S.C. § 1332 and 28 U.S.C. § 1367 are lengthy and, therefore, set out in Appendix 88a-100a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. On April 20, 2005, the United States District Court for the District of Maryland appointed Respondent Robb Evans & Associates, LLC ("REA"), as receiver over the assets of Andris Pukke ("Pukke") and DebtWorks, Inc., in a civil action commenced by the United States Federal Trade Commission ("FTC"). *Federal Trade Comm'n v. Ameridebt, et al.*, Case No PJM-03-3317 (D. Md.) (the "*FTC Action*"). Appendix 63a. The FTC brought the *FTC Action* against Pukke and entities under his control to secure relief against them pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (the "FTC Act"). On May 16, 2006, the District Court issued its Final Judgment and Order against Defendants in the *FTC Action*. Appendix 22a. Petitioner Jeffrey Holibaugh ("Holibaugh") was not a party to the *FTC Action*.

On September 6, 2007, REA commenced this *separate* action against Holibaugh, a citizen of Maryland, in the United States District Court for the District of Maryland to collect on an Installment Loan Note and Security Agreement ("Note") that Holibaugh had executed in favor of Infinity Resources Group, Inc. ("Infinity"), also a citizen of Maryland. REA's Complaint against Holibaugh contained three exhibits. Two of the three exhibits attached to REA's Complaint against Holibaugh established REA's authority to act as a receiver over Infinity, one of the entities under Pukke's control. Exhibit 1 to REA's Complaint was the District Court's Preliminary Injunction in the *FTC Action* whereby REA was initially appointed receiver. Appendix 63a. Exhibit 2 was a Final Order in the *FTC Action* in which the District Court restated

REA's authority to act as receiver. Appendix 22a. The third exhibit to REA's Complaint against Holibaugh was the Note itself upon which REA sought to recover from Holibaugh. The Note contains a choice of law clause stating that it is to be interpreted under the laws of the District of Columbia. *Robb Evans*, 609 F.3d at 364 n.4.

Holibaugh contests the subject-matter jurisdiction of the District Court in this action. The District Court had no subject-matter jurisdiction over this civil action because this civil action does not arise under the laws of the United States within the meaning of 28 U.S.C. § 1331, and because this civil action is between citizens of the same state within the meaning of 28 U.S.C. §§ 1332(a)(1) and (c). REA in this action alleged, and it is undisputed, that, at the time the Complaint was filed in this action, Infinity was a citizen of Maryland. REA pleaded that "at all times material hereto," Infinity "was an entity organized under the laws of the State of Maryland" and had "its principal place of business in Germantown, Maryland." It is similarly incontrovertible that, at all relevant times, Holibaugh was a citizen of Maryland. In his Answer, Holibaugh admitted that "since February 2005 he has been and continues to be a citizen and resident of Maryland." In this action, Plaintiff and Defendant are citizens of the same state.

2. REA filed its Complaint on September 6, 2007. On March 11, 2009, the District Court granted REA's motion for summary judgment on the enforcement of the Note, and denied Holibaugh's cross-motion for summary judgment on the Note. On March 26, 2009, Holibaugh moved pursuant to Rules 60(b)(4) and 12(h)(3) of the Federal Rules of

Civil Procedure to vacate the District Court's judgment on the ground that the District Court lacked subject-matter jurisdiction. On March 31, 2009, while Holibaugh's post-judgment motion was pending, the District Court entered a Final Order of Judgment against Holibaugh on the Note for $1,185,316.64. On June 12, 2009, the District Court entered an order denying Holibaugh's post-judgment motion to vacate. Appendix 20a.

3. On April 10, 2009, while his motion to vacate was pending in the District Court, Holibaugh filed an initial notice of appeal. On June 25, 2009, after the District Court had denied Holibaugh's motion to vacate, Holibaugh made timely amended notice of appeal of the District Court's initial order on the cross motions for summary judgment, its Final Order of Judgment, and its denial of Holibaugh's post-judgment motion to vacate the earlier orders due to the District Court's lack of subject-matter jurisdiction. The Fourth Circuit's decision was entered on June 29, 2010. On July 13, 2010, Holibaugh timely filed his Petition for Rehearing and for Rehearing *En Banc*. On July 27, 2010, the Fourth Circuit denied Holibaugh's Petition for Rehearing and for Rehearing *En Banc*. Appendix 87a.

REASONS FOR ALLOWANCE OF THE WRIT

The Fourth Circuit's opinion cannot be squared with the limits imposed by Article III, Section 2, of the United States Constitution, 28 U.SC. § 1367(a), or this Court's decision in *Peacock v. Thomas*, 516 U.S. 349 (1996), on the subject-matter jurisdiction of the federal district courts.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co of America, 511 U.S. 375, 377 (1994) (citations omitted); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005) (same).

In 1990, Congress codified the common law terms "pendent" and "ancillary" jurisdiction at 28 U.S.C. § 1367(a), establishing that the federal district courts have "supplemental jurisdiction" to hear claims otherwise outside of the district courts' original jurisdiction that are nevertheless "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997). Several Circuit Courts of Appeal have recognized that the statutory "case or controversy" language in 28 U.S.C. § 1367(a) extends to the limits of Article III. *See, e.g., Voda v. Cordis Corp.*, 476 F.3d 887, 894 (Fed. Cir. 2007); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212 n.5 (2d Cir. 2004); *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995).

This Court has recognized that the supplemental jurisdiction of the district courts has

two aspects. First, and as now established by 28 U.S.C. § 1367, supplemental jurisdiction exists "to permit disposition by a single court of claims that are, in varying respects or degrees, factually interdependent." *Kokkonen*, 511 U.S. at 379-80. Second, the federal district courts retain jurisdiction to "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.*, at 380. In *Peacock*, this Court further defined the limits of the second aspect of supplemental jurisdiction, denominated "ancillary enforcement jurisdiction," which extends to "a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments – including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). But in *Peacock*, this Court was careful not to let "ancillary enforcement jurisdiction" swallow the need for a statutory basis for the exercise of subject-matter jurisdiction:

> Our recognition of these supplementary *proceedings* has not, however, extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment. *We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment.*

Id. at 357 (emphases added). Yet, as explained by Circuit Judge Gregory in his dissent, Appendix 13a-18a, the Fourth Circuit's decision allows precisely

what *Peacock* forbids: REA commenced its civil action against Holibaugh *after* a final judgment had been entered in the *FTC Action* – an action in which Holibaugh was not a party – to impose liability on Holibaugh.

Moreover, this action goes well beyond what *Peacock* envisioned as impermissible. *Peacock* forbids the use of "ancillary enforcement jurisdiction" to impose an *existing* federal judgment on one not already liable for that judgment. Here, however, the Fourth Circuit has allowed REA to create in the federal district court -- without any independent basis for jurisdiction there -- a *new* federal judgment against Holibaugh on a theory of liability arising not under the FTC Act, but under the laws of the District of Columbia, wholly separate from any judgment created in the *FTC Action*. To make this case fit within *Peacock*, the Fourth Circuit -- without analysis -- characterized REA's action against Holibaugh as a "*separate proceeding*" allowed by *Peacock*, not as a separate "claim" in need of an independent basis for jurisdiction under 28 U.S.C. § 1332 or § 1367(a). *Robb Evans*, 609 F.3d at 363 n. 2. If the Fourth Circuit's stretching of the limits of *Peacock* is allowed to stand, there will be continued confusion, especially in federal receivership actions, over what constitutes a "proceeding" that falls within the narrow "ancillary enforcement jurisdiction" delimited by *Peacock*, and what constitutes a "claim" that must have an independent statutory basis for the original jurisdiction of the federal district courts.

The Fourth Circuit's decision concedes the absence of a statutory basis for the District Court's original jurisdiction. The Fourth Circuit's stretching

of *Peacock* arises out of its attempt to square *Peacock* with decisions of this Court in a series of cases predating 28 U.S.C. § 1367, all of which hold (or have been interpreted to hold) that a receiver appointed by a federal district court always has jurisdiction in that court to commence a suit on claims of any nature, regardless of the absence of a statutory basis for the district court's jurisdiction over such claims. *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895). Most of the more recent Circuit Court decisions in support of this precedent have invoked *Pope* for the proposition that there is always jurisdiction in the court of his appointment for an action brought by a federal receiver. *See, e.g., Donnell v. Kowell,* 533 F.3d 762, 769 (9th Cir. 2008)[1]; *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981).

The Fourth Circuit recognized that it has no authority to overrule *Pope*, *Riehle*, or *White*. *Robb Evans*, 609 F.3d at 364 n.3 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")). To the extent that they continue to serve as a basis for the subject-matter jurisdiction in the federal district courts, the *Pope* line of cases -- *Pope, Riehle, and White* -- will

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[1] *Donnell*, the only Circuit Court decision to invoke *Pope* since the passage of 28 U.S.C. § 1367, is distinguishable because, in that case, there was an independent, statutory basis for subject-matter jurisdiction in 15 U.S.C. *§§ 77v(a), 78aa.* See discussion, *supra.*

continue to undermine *Allapattah*, *Kokkonen*, *College of Surgeons*, and now, because of the Fourth Circuit's decision below, *Peacock*. The *Pope* line of cases should be expressly overruled.

Congress alone holds the power to create an omnibus subject-matter jurisdiction for receivership actions. The statutory bases for the subject-matter jurisdiction of the lower federal courts may not be ignored.

> Congress has the constitutional authority to define the jurisdiction of the lower federal courts, see *Finley v. United States*, 490 U.S. 545 . . . and once the lines are drawn, "limits upon federal jurisdiction . . . must neither be disregarded nor evaded," *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (citations truncated). Holibaugh respectfully submits that the Fourth Circuit's decision evades the jurisdictional lines established by 28 U.S.C. § 1367 and the narrow zone of "ancillary enforcement jurisdiction" described in *Peacock*.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE CONTINUED APPLICABILITY OF THE *POPE* LINE OF CASES WHENEVER A FEDERAL DISTRICT COURT APPOINTS A RECEIVER.

This civil action does not "arise under" the laws of the United States within the meaning of 28

U.S.C. § 1331. The well-pleaded-complaint rule governs whether a case "arises under" federal law for purposes of Section 1331. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-28 (1974) (*per curiam*). To arise under federal law, REA's Complaint must establish that Infinity's right to relief necessarily depends on resolution of a substantial question of federal law. *Id.* REA's Complaint does not, however, depend on the resolution of any question of federal law, substantial or not. Far to the contrary, this action arises under the laws of the District of Columbia. Nor is it availing here that REA proceeded in this action to give effect to the receivership established in the *FTC Action*. *Thompson v. Standard Oil Co. of N.J.*, 67 F.2d 644, 647 (4th Cir. 1933) (reciting that "it has been held that the fact that a judgment was recovered in a federal court does not, in a suit upon the judgment, raise a question under the laws of the United States") (citing *Provident Savings Society v. Ford*, 114 U.S. 635, 641 (1885)), *cert. denied*, 292 U.S. 631 (1934).

There is no diversity jurisdiction in the District Court because Infinity and Holibaugh are citizens of Maryland. The diversity jurisdiction of the federal district courts depends on the citizenship of the real parties to the controversy, even where the nominal party bringing the action is authorized to do so pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. *Navarro Savings Ass'n v. Lee*, 466 U.S. 458, 461 (1980). It is similarly axiomatic that a receiver acquires "no greater rights and powers to sue than the person or entity whose property is in receivership." *Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 657 (6th Cir. 2007); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th

Cir. 2003) ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action."). Since 1935 it has been well settled that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *McCandless v. Furlaud*, 296 U.S. 140, 148 (1935). In *McCandless*, Justice Cardozo "clearly emphasized that the receiver in that case was suing on behalf of the corporation, not third parties . . . " *Id.* In other words, the receiver can only make a claim which the corporation could have made. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429 (1972) (citing *McCandless*, 296 U.S. 140).

Nor does 28 U.S.C. § 1367 provide "supplemental" jurisdiction here. That statute allows jurisdiction to extend only in narrow circumstances in a civil action in which there is otherwise a basis for jurisdiction: Here, there is no basis whatsoever. *See, e.g., Exxon Mobil*, 545 U.S. at 554 (holding that "[i]n order for a federal court to invoke supplemental jurisdiction . . . it must first have original jurisdiction over at least one claim in the action."); *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 21 (1st Cir. 2008) ("The plain language of [28 U.S.C. § 1367] incorporates this well established requirement that there be a viable action over which the district court has 'original jurisdiction' before supplemental jurisdiction may be considered").

Nor does 28 U.S.C. § 754 confer jurisdiction upon the District Court. "The fact that a federal receiver has the capacity to sue . . . and files an action in federal court does not, however, confer subject-matter jurisdiction upon that court." *U.S. v.*

Franklin Nat'l Bank, 512 F.2d 245 (2d Cir. 1975)). Hence, the appointment of REA as receiver in the *FTC Action* does not confer subject-matter jurisdiction in this action.

The essential basis for the Fourth Circuit's finding jurisdiction in this action is *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899). The federal district court for the Central District of California correctly summed up *Pope* as follows:

> Plaintiff-receiver had filed an action in federal court against defendant railroad to enforce the claims of his estate to certain property. State law claims were asserted, and the plaintiff had obtained leave of the court of his appointment to file the claims. After a money decree in [receiver's] favor, the Court of Appeals for the Seventh Circuit ultimately reversed the lower court and ordered the cause dismissed. The [receiver] appealed to the Supreme Court, arguing that the jurisdiction of [the receiver's] cause of action was founded not only on diversity of citizenship (in which case the determination of the Court of Appeals was final) [under the Evarts Act], but also because of the ancillary nature of the suit (in which case the Supreme Court could hear the appeal). The Court dismissed the appeal, holding that the jurisdiction of the ancillary matter was entirely dependent upon the jurisdiction in the suit in which the receiver was

appointed, and that since jurisdiction of the main action was based on diversity, jurisdiction of the receiver's ancillary matter must also be based on diversity. The Court refuted the suggestion that the fact of appointment was enough to confer federal jurisdiction on all claims brought by a receiver:

> "We cannot accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered."

173 U.S. at 578-79, 19 S. Ct. at 502. Nothing in *Pope* suggests that the appointment of a receiver by a federal court mandates that suits brought by the receiver alleging non-federal claims be heard in the court of appointment.

Canut v. Lyons, 450 F. Supp. 26, 31 (C.D. Cal. 1977).[2]

The Ninth Circuit in *Donnell v. Kowell*, 533 F.3d 762 (9th Cir. 2003) does not depend on *Pope* (although *Pope* is cited therein). As stated by the Ninth Circuit in *Donnell*:

> The federal securities laws create exclusive federal jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by" federal securities laws. *15 U.S.C. §§ 77v(a), 78aa.* The federal district court properly authorized the Receiver to bring suits under state law in federal court under ancillary jurisdiction for the purpose of effectuating its decree of liability against Wallenbrock because the primary lawsuit against Wallenbrock presented a federal question. *See 28 U.S.C. § 1367; Fed. R. Civ. P. 66.*

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[2] The analytical framework for *Pope* is Section 6 of the Act of March 3, 1891, 26 Stat. 826 ("Evarts Act"), the Act that created the initial circuit courts of appeal, and which this Court interpreted in *Pope* to mean that a receiver appointed in an action arising under federal law is not authorized to bring an action alleging state law claims, and *vice versa*. Whenever Pope was invoked to establish jurisdiction of a receiver's state-law action outside of a question raised by the application of the Evarts Act, *Pope* was misused. Even if it is assumed that the *Pope* framework survives the subsequent enactment of 28 U.S.C. §§ 1331, 1332, and 1367, *Pope* is useless to REA here. REA was appointed in the *FTC Action*, which raises a question under federal law; in this action, however, REA seeks to enforce a state-law claim. That is precisely what *Pope* forbade, albeit long ago and under a statutory scheme that has no application here.

Donnell, 533 F.2d at 769. REA's action against Holibaugh does not raise a question invoking the federal securities laws or Congress's broad authorization of original jurisdiction in the federal district courts for "all suits in equity actions at law brought to enforce any liability or duty created by" such laws. *Donnell* is consonant with 28 U.S.C. § 1367(a), which provides the sole basis for supplemental jurisdiction "except as expressly provided otherwise by Federal statute."

Congress has not authorized the same broad original jurisdiction in support of the FTC Act. By 15 U.S.C. § 53(b), Congress authorized the FTC to bring action in the federal district courts against any person or entity that the FTC has reason to believe is violating Section 12 of the FTC Act, 15 U.S.C. § 52, by disseminating false advertising in interstate commerce. The FTC did not seek to plead Holibaugh into the *FTC Action*, as there is not now -- and there never has been -- any basis to allege that Holibaugh had violated (or had participated with Pukke in violating) the FTC Act. But neither, however, did REA seek to plead Holibaugh into the *FTC Action* once the District Court had authorized REA to act as receiver for Pukke's assets. The FTC Act ostensibly authorizes the federal district courts to exercise such jurisdiction:

> In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation [besides one violating 15 U.S.C. § 52] should be a party in such suit [commenced pursuant to 15 U.S.C. § 53], cause such other person, partnership, or

> corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought.

15 U.S.C. § 53(a). The District Court in the *FTC Action* arguably had discretion to exercise supplemental jurisdiction in that action over REA's dispute with Holibaugh on the Note. 28 U.S.C. §§ 1367(a) and (c). Yet REA never asked the District Court in the *FTC Action* to allow REA -- pursuant either to 15 U.S.C. § 53(a) or to 28 U.S.C. §§1367(a) and (c) -- to proceed in the *FTC Action* in the name of Infinity against Holibaugh on the Note.

Instead, REA commenced this separate action against Holibaugh, for which there is no statutory basis for jurisdiction in the federal district court.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION IN THIS ACTION AND THIS COURT'S DECISION IN *PEACOCK v. THOMAS*.

The Fourth Circuit's decision does not address its conflict with *Peacock*. Instead, the Panel borrows a word from *Peacock* – "proceedings" – to characterize the lawsuit that REA commenced against Holibaugh without any statutory basis for jurisdiction. This Court has made it clear that the supplemental jurisdiction of the federal district courts may be invoked only in the presence of an independent basis for the exercise of original jurisdiction. There is no independent basis for jurisdiction here.

And there is no compelling reason under *Peacock* to extend "proceedings" to this civil action, which REA brought as an independent civil action against Holibaugh after final judgment had been entered in the action in which REA was appointed receiver. This action does not involve any of the "proceedings" permitted by *Peacock* as an exercise of a district court's "ancillary enforcement jurisdiction."

There is nothing in the Fourth Circuit's opinion that explains how, if at all, REA's action against Holibaugh in this separate action somehow vindicates the District Court's authority in the *FTC Action*. Without that basis, the Fourth Circuit's decision must stretch Peacock to allow what Congress has forbidden at 28 U.S.C. §§ 1331, 1332, and 1367(a).

CONCLUSION

For all of the foregoing reasons, Holibaugh respectfully requests that the Supreme Court grant review of this matter.

Dated: October 25, 2010
Rockville, Maryland
Respectfully Submitted ,

THE ROTBERT LAW GROUP, LLC

/s/ Mitchell J. Rotbert
Mitchell J. Rotbert
9710 Traville Gateway Drive #246
Rockville, Maryland 20850
Phone: (240) 876-3046
Fax: (240) 238-9698
mrotbert@rotbertlaw.net

Counsel for Petitioner Jeffrey Holibaugh

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBB EVANS & ASSOCIATES, LLC,
as Receiver over the Assets of
Andris Pukke and DebtWorks,
Inc.,
Plaintiff-Appellee, No. 09-1429
v.

JEFFREY HOLIBAUGH,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, Senior District Judge.
(8:07-cv-02367-PJM)

Argued: May 11, 2010

Decided: June 29, 2010

Before GREGORY and SHEDD, Circuit Judges, and
Arthur L. ALARCÓN, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by published opinion. Judge Shedd wrote the majority opinion, in which Senior Judge Alarcón joined. Judge Gregory wrote a dissenting opinion.

COUNSEL

ARGUED: Mitchell Jay Rotbert, ROTBERT LAW GROUP, LLC, Rockville, Maryland, for Appellant. Gary Owen Caris, MCKENNA, LONG & ALDRIDGE, LLP, Los Angeles, California, for Appellee. **ON BRIEF**: Lesley Anne Hawes, MCKENNA, LONG & ALDRIDGE, LLP, Los Angeles, California, for Appellee.

OPINION

SHEDD, Circuit Judge:

After Robb Evans & Associates, LLC ("REA") was appointed receiver over the assets of Andris Pukke, it brought this action against Jeffrey Holibaugh to recover receivership property — specifically, payment on a promissory note. The district court granted summary judgment in favor of REA and denied Holibaugh's post-judgment motion to set aside the judgment and dismiss. Holibaugh now appeals the summary judgment and post-judgment orders. For the following reasons, we affirm.

I.

The Federal Trade Commission ("FTC") filed a civil enforcement action charging Ameridebt, Inc., DebtWorks, Inc., and Pukke with violations of 15 U.S.C. § 45(a) in connection with a fraudulent debt counseling scheme. The FTC and Pukke entered into a stipulation for judgment by the district court settling the FTC claims. *Fed. Trade Comm'n v. Ameridebt, Inc., et al.*, No. PJM 03-3317 (D.Md. May 16, 2006). In its order effecting this judgment, the

district court appointed REA as the equity receiver over Pukke's assets to "maintain custody, control, and possession of all Assets, including . . . all sums of money now or hereafter due or owing to the Receivership, with full power to: collect, receive, and take possession of all Assets. . . ." J.A. 57.

The order authorized REA to "[b]ring such legal actions based on law or equity in any state, federal, or foreign court as it deems necessary or appropriate in discharging its duties as Receiver relating to the location, marshaling, and management of Assets constituting Receivership property." J.A. 58. Additionally, the order provided that the district court "shall retain jurisdiction of this matter for all purposes, including construction, modification, and enforcement of this Order." J.A. 69.

One of the receivership assets is Infinity, an entity owned by Pukke that made loans to Pukke's friends, family members, and business associates. Through a series of loans, Infinity loaned approximately $1,340,000 to Holibaugh and his business associate to capitalize a restaurant venture, and Holibaugh executed a note ("the Note") in favor of Infinity for $1,330,116.75, representing the outstanding balance of these loans. Holibaugh defaulted, and REA filed this action in the district court as receiver to collect on the Note.

REA moved for summary judgment, arguing that there is no genuine issue of material fact in dispute and that it is entitled to judgment as a matter of law on its claim for payment on the Note. Holibaugh then filed a cross-motion for summary judgment alleging that (1) the statute of limitations barred REA's claims and (2) based on various oral

promises made by Pukke, Holibaugh was not personally liable on the Note. The district court granted REA's motion for summary judgment, denied Holibaugh's cross-motion for summary judgment, and awarded REA $1,435,686.04. In doing so, the court first found that the action was not barred by the statute of limitations. The court also applied the parol evidence rule and found that there is no genuine issue of material fact that Holibaugh executed the Note and is bound thereby.

Holibaugh then moved under Fed. R. Civ. P. 60(b)(4) and 12(h)(3) to set aside the judgment and dismiss for lack of subject matter jurisdiction. He argued that (1) there is no diversity of citizenship; (2) there is no federal question because REA filed this suit solely pursuant to Maryland state law; and (3) REA cannot establish a basis for supplemental jurisdiction under 28 U.S.C. § 1367 or common law ancillary jurisdiction. The court denied the motion. Holibaugh now appeals both the order granting summary judgment to REA and the order denying his post-judgment motion.

II.

A.

First, we consider Holibaugh's argument that the district court erred in denying his post-judgment motion alleging lack of subject matter jurisdiction. Specifically, he contends that the district court erroneously held that it has ancillary subject matter jurisdiction over this action based on REA's appointment as receiver in the FTC enforcement action. We review *de novo* the district court's decision finding that it had subject matter

jurisdiction. *New Horizon of NY, LLC v. Jacobs*, 231 F.3d 143, 150 (4th Cir. 2000).

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The burden of establishing subject matter jurisdiction is on REA, the party asserting jurisdiction. *Id.*

The Supreme Court has held that a district court has ancillary subject matter jurisdiction over an action brought by a receiver in furtherance of its appointment where the district court had federal question jurisdiction over the original action in which it appointed the receiver. *See Riehle v. Margolies*, 279 U.S. 218, 223 (1929) ("The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets. It may do this either in the original suit . . . or by ancillary proceedings.") (citations omitted); *Pope v. Louisville, N.A. & C. Ry. Co.*, 173 U.S. 573, 577 (1899) (noting that a court of appointment has ancillary subject matter jurisdiction over a suit brought by a receiver for recovery of receivership property); *White v. Ewing*, 159 U.S. 36, 38-39 (1895) (holding that a court that appoints a receiver for an insolvent corporation retains jurisdiction over claims brought by the receiver against debtors of the corporation). *See also Alexander v. Hillman*, 75 F.2d 451, 453 (4th Cir. 1935) ("[I]t is well settled that the courts of the United States have jurisdiction to entertain, either in equity or at law as may be appropriate, ancillary proceedings in aid of a

receivership suit pending in a federal court, even though other elements of federal jurisdiction . . . may be lacking."). More recently, the Sixth Circuit has explained this concept:

> [T]he initial suit which results in the appointment of the receiver is the primary action and . . . any suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the district court has ancillary subject matter jurisdiction of every such suit irrespective of diversity, amount in controversy or any other factor which would normally determine jurisdiction.

Haile v. Henderson Nat'l Bank, 657 F.2d 816, 822 (6th Cir. 1981) (holding that a district court that appointed a receiver over a church had jurisdiction over the receiver's actions against a Bank to collect receivership funds).

Here, the district court appointed REA as receiver to locate and collect the various assets of Pukke on behalf of the FTC. It specifically authorized REA to take necessary and appropriate legal action to collect receivership assets. Because REA was appointed by the district court in an action over which the district court had federal subject matter jurisdiction, and REA's action against Holibaugh is in furtherance of its duty to marshal Pukke's assets, this action is within the district court's ancillary jurisdiction recognized by the Supreme Court for over a century.

Notwithstanding this precedent, Holibaugh contends that when Congress enacted 28 U.S.C. §

1367 in 1990, thereby codifying the concept of supplemental jurisdiction, it eliminated common law ancillary jurisdiction as applied to this case. He further argues that REA's action here does not qualify for supplemental jurisdiction under § 1367.

We disagree with Holibaugh's argument. "Congress codified much of the common-law doctrine of ancillary jurisdiction as part of 'supplemental jurisdiction' in 28 U.S.C. § 1367." *Peacock v. Thomas*, 516 U.S. 356, 867 n.5 (1996); *see also Shanaghan v. Cahill*, 58 F.3d 106, 109 n.1 (4th Cir. 1995) ("[S]upplemental jurisdiction also incorporates the doctrine of ancillary jurisdiction.").[1] However, it did not codify all of common law ancillary jurisdiction.

Although § 1367 governs ancillary jurisdiction over *claims* asserted in a case over which the district court has federal subject matter jurisdiction, it does not affect common law ancillary jurisdiction "over related *proceedings* that are technically separate from the initial case that invoked federal subject matter jurisdiction," which remains governed by case law. 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3523.2 (3d ed. 2010) (emphasis in original).[2] *See also*

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[1] Section 1367 provides, in relevant part,

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other *claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

(emphasis added).

[2] Although the dissent correctly observes that absent congressional authorization, a district court cannot exercise jurisdiction over additional *claims* involving new parties in an

United States v. Texas, 507 U.S. 529, 534 (1993) ("'[C]ourts may take it as a given that Congress has legislated with an expectation that [a] common law principle will apply except when a statutory purpose to the contrary is evident.'") (internal citations omitted). The Supreme Court has acknowledged the continued existence of common law ancillary jurisdiction with regard to separate proceedings after Congress enacted § 1367. *See Kokkonen*, 511 U.S. at 379-82 (discussing the availability of ancillary jurisdiction but declining to extend it based on the facts of that case); *Peacock*, 516 U.S. at 354-56 (same).[3]

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action, *see Finley v. United States*, 490 U.S. 545, 556 (1989), *superseded by statute*, Judicial Improvements Act of 1990, Pub.L. 101-650, 104 Stat. 5089 (codified at 28 USC § 1367); *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 539-40 (2002), in this case, we are addressing the doctrine of ancillary jurisdiction over separate *proceedings*.

[3] Subsequent to the enactment of § 1367, at least one other circuit has specifically recognized the continued existence of common law ancillary jurisdiction over an action filed by a receiver in furtherance of the powersand duties of the receiver under its appointment. *See Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008).

Although the dissent observes that the Supreme Court has refused to extend the doctrine of ancillary jurisdiction over separate proceedings to new contexts, *see Kokkonen*, 511 U.S. at 380-82 (declining to extend ancillary jurisdiction to an action to enforce terms of settlement agreement); *Peacock*, 516 U.S. at 356-59 (declining to extend ancillary jurisdiction to an action seeking to "pierce the corporate veil" in order to hold a corporate officer liable for an ERISA judgment), these cases in no way diminish the long-recognized doctrine of ancillary jurisdiction over actions brought by court-appointed equity receivers. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals

In short, based on controlling precedent, we hold that the district court properly exercised subject matter jurisdiction. Therefore, we affirm the denial of Holibaugh's post-judgment motion.

B.

We next turn to Holibaugh's argument that the district court erred in granting summary judgment. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's order granting summary judgment *de novo*. *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 694 (4th Cir. 2007) (en banc).

Holibaugh contends that the district court erred in holding that the Note is a negotiable instrument and applying a six-year statute of limitations under D.C. Code § 28:3-118(a) (applicable to negotiable instruments)[4] to conclude that the action is not time-barred. Holibaugh does not dispute that the action was timely filed if the six-year statute of limitations period applies, as the Note was executed on February 4, 2003, and this action was filed on September 6, 2007. Instead, he argues that the Note is not a negotiable instrument and therefore, the action is barred by a three-year

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should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[4] The Note contains a choice of law clause providing that it will be governed by the laws of the District of Columbia.

statute of limitations under D.C. Code § 12-301(7) (applicable to simple contracts).

D.C. Code § 28:3-104(a) sets forth the requirements for negotiability:

> [T]he term "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) Is payable on demand or at a definite time; and
>
> (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . . .

Holibaugh argues that the Note fails the first requirement because it is not "payable to bearer or to order." The Note specifically provides that Holibaugh "promises unconditionally *to pay to the order of Lender*, (the 'Noteholder'), the Amount Financed [defined as $1,330,116.75] with Interest payable in consecutive equal monthly installments." J.A. 73 (emphasis added). Because the clear language of the Note makes it "payable to the order of an identified person," D.C. Code § 28:3-109(b), it is payable to order, and Holibaugh's challenge to the first requirement lacks merit.

Holibaugh also contends that the Note fails the third requirement because it includes an "undertaking or instruction" by the maker of a note "to do any act in addition to the payment of money." D.C. Code § 28:3-104(a)(3). He bases his argument on the term of the Note providing that he will be considered in default if he assumes any additional "lines of credit without the prior written consent of the Lender." J.A. 73. However, a term that does no more than define an act of default does not encumber the Note so as to destroy its negotiability, as opposed to a term that imposes an affirmative obligation in addition to the core promise to pay. *See* D.C. Code § 28:3-104(a)(3) (prohibiting an additional obligation "to do any act" other than make payment on the Note); *In re AppOnline.com, Inc.*, 290 B.R. 1, 12 (Bankr. E.D.N.Y. 2003) (holding that a note is negotiable despite a provision accelerating payment if the borrower sold the property or if a beneficial interest in the corporate borrower was transferred). Therefore, Holibaugh did not obligate himself to any additional "undertaking or instruction" in contravention of § 28:3-104(a)(3).[5] Because the Note constitutes a negotiable instrument, the applicable statute of limitations period is six years, and it is undisputed that REA's lawsuit was filed within that time period.

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[5] Holibaugh also argues that he is a personal guarantor under the Note, which renders the note non-negotiable. However, Holibaugh signed as the sole borrower or maker of the Note, and there is no guarantor or coborrower. Therefore, this argument fails on its factual premise, and there is no need to discuss the legal argument involved.

C.

Finally, Holibaugh argues that the district court erred in granting summary judgment to REA because there is a genuine issue of material fact as to whether the parties intended that he be held personally responsible on the Note. Holibaugh contends that before he signed the Note, Pukke orally agreed that if the restaurant could not repay the loan, Pukke would not collect the debt from Holibaugh personally. He testified that it was "understood" that the restaurant was solely responsible for payment and that Pukke represented this to him before he executed the Note. However, Holibaugh acknowledged that he signed the Note as a borrower, not on behalf of the company or as a guarantor.

The district court excluded this testimony pursuant to the parol evidence rule. The parol evidence rule provides that extrinsic evidence "'is inadmissible to vary or contradict the terms of a valid, and plain and unambiguous, written contract.'" *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 327 (D.C. 2001) (quoting 17A Am. Jur.2d Contracts § 402 (1991)). Regardless of whether the Note is completely integrated or partially integrated as Holibaugh contends, we may not consider evidence that contradicts its plain and unambiguous terms. *See Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 783-84 (D.C. 2007) (explaining that even where a writing is partially integrated, meaning there may be additional consistent terms not addressed therein, only evidence that is consistent with the terms in the agreement is permitted).

The plain and unambiguous terms of the Note hold Holibaugh personally liable for the full amount of the Note, as the sole borrower. Thus, Holibaugh's testimony regarding Pukke's oral representations contradict these unambiguous terms and is excluded pursuant to the parol evidence rule absent an exception.

Holibaugh attempts to bring this evidence within the fraud exception to the parol evidence rule based on his alleged unilateral mistake as to Pukke's intent to enforce the Note. However, evidence of oral agreements to vary a party's obligation under the terms of a note, such as a promise not to enforce, is not considered fraud for purposes of the fraud exception to the parol evidence rule, and, consequently, such evidence is excluded. *See Fr. Winkler KG v. Stroller*, 839 F.2d 1002, 1005-1006 (3rd Cir. 1988) (discussing case law across the country applying this principle). Therefore, the district court properly excluded this evidence, and there are no material facts in dispute to preclude summary judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

GREGORY, Circuit Judge, dissenting:

The question in this appeal is whether a district court may hear an action brought by a receiver against a defendant, when both the claim and the defendant are unrelated to the underlying action in which the receiver was appointed, absent

congressional authorization. I believe that it may not and respectfully dissent from the majority's contrary holding.

***

Our resolution of the jurisdictional question here is complicated by two clearly conflicting lines of authority: First, in a string of cases between 1895 and 1935, the Supreme Court declared that district courts have jurisdiction to hear any claims brought by receivers properly appointed by the district court. *See Alexander v. Hillman*, 296 U.S. 222, 238 (1935); *Pope v. Louisville, N.A. & C. Ry. Co.*, 173 U.S. 573, 577 (1899); *White v. Ewing*, 159 U.S. 36, 38-39 (1895). On the other hand, in a more recent series of decisions, the Supreme Court changed course and held that federal courts lack power to hear any claims without congressional authorization. *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 539-40 (2002); *Finley v. United States*, 490 U.S. 545, 552 (1989). In doing so, the Court has criticized and rejected other, expansive descriptions of ancillary jurisdiction made by the Court at the turn of the Twentieth Century. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994).[6]

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[6] In *Kokkonen*, the Court confronted the view, previously expressed by the Court that ancillary jurisdiction encompassed any action "to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court." 511 U.S. at 379 (quoting *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904)) (internal alterations omitted). The Court, in an opinion by Justice Scalia, dismissed this application of ancillary jurisdiction as overly "expansive,"

Faced with this conflict, I feel compelled to follow the more recent line of authority. In *Finley*, the Court made clear that absent congressional legislation, a court with "jurisdiction over claims involving particular parties does not [have] jurisdiction over additional claims by or against different parties." 490 U.S. at 556; *see Raygor*, 534 U.S. at 539-40 (explaining "that absent authorization from Congress, a district court could not exercise pendent jurisdiction over claims involving parties who were not already parties to a claim independently within the court's subject matter jurisdiction").[7] Congress then enacted 28 U.S.C. § 1367, which permits federal courts to hear additional claims by or against additional parties if those claims "are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* § 1367(a). If, after *Finley*, district courts may not hear new claims involving additional parties without an express grant of jurisdiction by Congress, and Congress, in § 1367, grants the federal courts power only to hear new claims involving additional parties to the extent those claims are part of the same case or controversy, then it must be that district courts may not hear new claims involving additional parties that are not part of the same case or controversy as the underlying claim.

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stated that ancillary jurisdiction "does not stretch so far as that statement suggests," and refused to follow it. *Id.*

[7] So while it is true, as the majority maintains, that absent evidence of contrary intent we may assume that Congress acted against the backdrop of the common law, *see* Maj. Op. at 7, after *Finley*, that backdrop prohibits courts from hearing ancillary claims without congressional authorization.

In light of *Finley* and its progeny, § 1367 can only be read to abrogate the common law doctrine, announced in *White* that courts have the power to hear any and all new claims against additional parties brought by a receiver. *White*, *Pope*, and *Hillman* can no longer be good law to the extent they allow a receiver to bring new claims against a new defendant if that claim lacks any connection to the underlying suit that the district court is competent to hear.

The receiver here was appointed to manage Pukke's assets in a civil enforcement action brought by the FTC alleging that Pukke, through his corporations, Ameridebt and DebtWorks, engaged in a fraudulent debt counseling scheme. After the parties settled the underlying suit, the receiver brought this action under District of Columbia law against Holibaugh to collect on a debt Holibaugh owed to Pukke's other corporation, Infinity, and which undisputedly had no connection whatever to the counseling scheme. Therefore, contrary to the receiver's claim, the district court lacked jurisdiction to hear the suit under § 1367, both because it was filed after the underlying suit was resolved and because there was no connection between the appellant or the cause of action and the underlying FTC suit. *Id.* § 1367(a); *see Peacock v. Thomas*, 516 U.S. 349, 355-56 (1996) (holding that the Court lacked ancillary jurisdiction to hear claims brought after underlying suit was resolved and where allegations in subsequent suit, which sought to pierce the corporate veil, had "little or no factual interdependence" with underlying question of whether corporate officers had breached their fiduciary duty).

As I read its opinion, the majority agrees that § 1367 does not provide the district court with jurisdiction to hear the receiver's claim against Holibaugh. Instead, the majority attempts to salvage the long-lost doctrine of unlimited receivership jurisdiction by claiming that it falls within the "proceedings prong" of ancillary jurisdiction. Under this prong, district courts have very narrow power to hear "subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments." *Id.* at 356; *see Kokkonen*, 511 U.S. at 379-80. The relationship between this case and an enforcement proceeding, however, brings to mind images of a square pegs in round holes and bridges too far.

The majority is correct to note that the Supreme Court has recognized the continuing vitality of enforcement jurisdiction absent explicit congressional authorization, *see* Maj. Op. at 6-7, but the very case the majority cites for the proposition makes it equally clear that this case cannot be redefined as an enforcement proceeding. In *Peacock*, the Court recognized a district court's power to use garnishment, mandamus, or attachment against a third-party to enforce its judgment against a defendant. 516 U.S. at 356-57. The Court explicitly stated, however, that enforcement jurisdiction did not extend to "a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Id.* at 357. And it went on to say that enforcement jurisdiction did not apply to "proceedings that are 'entirely new and original' or where 'the relief sought is of a different kind or on a different principle' than that of the prior decree." *Id.* at 358 (internal citations and alterations omitted). In short, where a subsequent claim "is founded not only upon different

facts than the [underlying] suit, but also upon entirely new theories of liability," the court's ancillary enforcement jurisdiction is inapplicable. *Id.*

The claim advanced by the receiver here, to recover on a note against Holibaugh, is everything that *Peacock* explicitly says enforcement jurisdiction is *not*. The receiver has never suggested, let alone pleaded or proven, that its suit against Holibaugh has anything to do with the judgment entered by the district court in conjunction with Pukke's settlement with the FTC. It is an "entirely new and original" action, seeking a legal remedy that is based on "different facts" *and* "entirely new theories of liability" from the FTC action, *id.*, to wit, a claim to recover on a note against a defendant who had nothing to do with the underlying fraud.

Simply put, the receiver's suit against Holibaugh is a prototypical example of an entirely new claim against a new party, which cannot be brought in federal court absent statutory authorization. *Finley*, 490 U.S. at 556. Because neither § 1367 nor any other statutory provision grants the district court jurisdiction to hear this claim, I would vacate the judgment and remand with instructions to dismiss the suit for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1429 (8:07-cv-02367-PJM)

ROB EVANS & ASSOCIATES, LLC, as Receiver over the Assets of Andris Pukke and DebtWorks, Inc.

Plaintiff – Appellee

v.

JEFFREY HOLIBAUGH

Defendant – Appellant

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
(301) 344-0632

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: *Robb Evans & Associates LLC v. Jeffrey Holibaugh*
Civil No. PJM 07-2367

DATE: June 11, 2009

* * * * * * * * *

This suit was brought by Robb Evans & Associates, LLC, pursuant to its duties as Receiver in *Federal Trade Commission v. Ameridebt, Inc., et al.*, Case No. PJM 03-3317, to recover receivership property transferred to Jeffrey Holibaugh. On March 31, 2009, after granting Robb Evans' Motion for Summary Judgment, the Court entered a Final Order of Judgment against Holibaugh in the sum of $1,435,686.04. Holibaugh has filed a Motion to Set Aside the Judgment [Paper No. 43], which the Court **DENIES**.

Holibaugh challenges the Court's jurisdiction in this matter. Specifically, he argues that diversity jurisdiction does not exist pursuant to 28 U.S.C. §

1332 because both Holibaugh and Infinity Resources Group, Inc., the real party in interest, were citizens of Maryland at the time the Complaint was filed.

However, as Robb Evans correctly points out, this Court has ancillary and supplemental jurisdiction over cases brought by Robb Evans pursuant to its receivership duties in PJM 03-3317. *See* 28 U.S.C. §§ 1331 and 1367; *see also Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008) (federal court had ancillary subject-matter jurisdiction over action brought by receiver in connection with receivership); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822 (6th Cir. 1981) ("[A]ny suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the district court has ancillary subject matter jurisdiction of every such suit irrespective of diversity, amount in controversy or any other factor which would normally determine jurisdiction."); *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573 (1899).

Accordingly, Holibaugh's Motion to Set Aside the Judgment [Paper No. 43] is **DENIED**.

Despite the informal nature of this ruling, it shall constitute an Order of Court and the Clerk of the Court is directed to docket it accordingly.

/s/ PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

[Entered May 17, 2006]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERIDEBT, INC., et al.,

Defendants.

Civil Action No. PJM 03-3317

STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION AS TO DEFENDANTS DEBTWORKS, INC. AND ANDRIS PUKKE

Plaintiff, the Federal Trade Commission ("Plaintiff," "FTC" or "Commission"), filed a Complaint for permanent injunctive and other equitable relief pursuant to Sections 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 53(b). The Complaint charges Defendants AmeriDebt, Inc. ("AmeriDebt"), DebtWorks, Inc. ("DebtWorks"), and Andris Pukke ("Pukke") with unfair or deceptive acts or practices in promoting and offering credit counseling and debt management plans ("DMPs") in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Complaint also names Pamela Pukke as a relief defendant.

The Plaintiff and Defendants Pukke and DebtWorks ("Defendants"), by and through their respective counsel, have agreed to entry of this Stipulated Final Judgment and Permanent Injunction ("Order") by this Court without trial or adjudication of any issue of fact or law, and without Defendants admitting liability for any of the matters alleged in the Complaint, except that Defendants stipulate that: (1) any and all funds and assets that comprise Receivership Property were derived from payments by consumers as an alleged consequence of the acts and practices alleged in the FTC's complaint; (2) the Defendants do not have a legitimate claim to those funds; and (3) those funds are held in constructive trust for consumers.

This Order settles only the FTC's claims against Defendants Pukke and DebtWorks, and shall not act as a bar to any claim by the FTC nor preclude the FTC from seeking any remedy against any other persons, corporations, or entities, including persons who may be subject to portions of this Order as persons acting in active concert or participation with Defendants, or persons who are party to any indemnification agreement with Defendants. Further, the Parties have agreed that this Order shall be filed for approval contemporaneously with the filing of a motion for approval of the nationwide class action settlement as to Defendants in *Alyssa Polacsek, et al.* v. *Debticated Consumer Counseling, Inc., et al.*, Case Number P JM-04-cv-631 (D. Md.) (consolidated for trial with the Commission's action herein) ("Nationwide Class Action"). These two settlements are intended to resolve all claims that have been or could have been asserted on the facts as alleged in the FTC and Nationwide Class Action cases. In the event that, for any reason, the settlement in the Nationwide Class

Action does not receive final approval or the Nationwide Class does not prevail on any appeal taken from a final approval, Defendants agree and stipulate that this Order remains final as to the FTC and the Defendants.

NOW, THEREFORE, the Plaintiff and Defendants having requested the Court to enter this Order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

FINDINGS

1. This is an action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to secure permanent injunctive relief, rescission, restitution, disgorgement, and other equitable relief for Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

2. This Court has subject matter jurisdiction over this action and jurisdiction over all parties. Venue in the District of Maryland is proper.

3. The activities of Defendants charged in the Complaint are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Any and all funds and assets comprising Receivership Property were derived from payments by consumers as an alleged consequence of the acts and practices alleged in the FTC's complaint. Further, Defendants do not have a legitimate claim to those funds. Therefore, any and all funds and assets

comprising Receivership Property are held in constructive trust for consumers as defined by applicable state law.

5. Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendants also waive all rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412.

6. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies.

7. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon Defendants, their successors, and assigns, and their officers, agents, servants, employees, and attorneys, and upon those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

8. This Order is remedial in nature and shall not be construed as the payment of a fine, penalty, punitive assessment, or forfeiture.

9. On July 11, 2005, Pukke filed a voluntary petition for relief under the provisions of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the United States Bankruptcy Court for the Central District of California, Santa Ana Division ("Pukke Bankruptcy Case").

10. Subsequently, the Bankruptcy Court granted the FTC's motion to transfer venue of the Pukke Bankruptcy Case to the District of Maryland, where it was docketed as Case No. 05-2362-PJM. This Court withdrew the reference as to the Pukke Bankruptcy Case and then stayed the Pukke Bankruptcy Case.

11. The Commission's action against Pukke, including the entry and enforcement of this Order, is not stayed by 11 U.S.C. § 362(a)(I), (2), (3) or (6) because it is an exercise of the Commission's police or regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exemption from the automatic stay.

12. Entry of this Order is in the public interest.

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including, without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, interest in any trust, and all cash, wherever located, and shall include both existing Assets and Assets acquired after the date of entry ofthis Order. Further, the definition of Assets shall include all books, records, computer files, databases and other information that may be utilized to determine

the existence of Assets, liabilities, or the location of property.

2. "Assisting" means providing assistance or support to any person or entity, including, but not limited to, providing any of the following goods or services: (a) formulating, drafting, providing, or arranging for the formulation, drafting, or provision of any marketing material; (b) providing names of, or assisting in the generation of, potential customers; (c) performing marketing services of any kind; (d) formulating, drafting, providing, or arranging for the formulation, drafting, or provision of any employee script; (e) providing any training or training materials; or (f) providing information, advice, consultation, or materials regarding business operations, processes, or practices.

3. "Credit counseling" means providing individualized advice to a consumer about the consumer's credit, debts, or budget.

4. "Credit education" means providing general information or advice to a consumer about credit, debt, or budget matters.

5. "Debt management" means providing any service to a consumer relating to managing debts, including providing debt management plans.

6. "Debt management plan," "debt management program," or "DMP" means a plan or program that involves or purports to involve (a) a consumer paying one consolidated periodic payment to the program to cover the debts

that are included in the program; and (b) the program disbursing payments to the creditors of the consumer.

7. "DebtWorks" means DebtWorks, Inc., whether acting directly or through any corporation, subsidiary, division, or other device.

8. "Document" is synonymous in meaning and equal in scope to the usage of the term in Rule 34(a) of the Federal Rules of Civil Procedure and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which the information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or other non-identical copy is a separate document within the meaning ofthe term.

9. "Net Monies" means all monies obtained by the Receiver after the Receiver marshals and liquidates Receivership Property and pays all approved compensation and expenses.

10. "Person" means any natural person or organization including, but not limited to, any proprietorship, partnership, company, firm, corporation, joint venture, society, association, trust, or government agency or unit, and any other group or combination acting as an entity.

11. "Pukke Bankruptcy Estate" means the bankruptcy estate that was created pursuant to 11 U.S.C. § 541(a) upon the commencement ofthe Pukke Bankruptcy Case.

12. "Receiver" or "Permanent Receiver" shall mean Robb Evans & Associates LLC, the receiver appointed by the Court in this matter over the Assets of Defendants Andris Pukke and DebtWorks, Inc.

13. "Redress Program" shall mean a program to be established and administered by the FTC for the purpose of providing consumer redress as set forth in this Order.

14. "Receivership Property" shall mean any Assets, wherever located, that are (1) owned, controlled or held by or for the benefit ofPukke or DebtWorks, in whole or in part; (2) in the actual or constructive possession ofPukke or DebtWorks; (3) held by an agent of Pukke or DebtWorks, including as a retainer for the agent's provision of services to either or both of them; or (4) owned, controlled or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks, including The P Family Trust, The P II Family Trust, and The Pukke 2002 Family Irrevocable Trust. Defendants agree that all Receivership Property constitutes assets held for consumers in constructive trust as defined by applicable state law. *Provided however,* that Receivership Property shall not include (1) income earned by Pukke from gainful employment in accordance with Sections I, II, and XII of this Order or (2) funds given to Pukke by his friends and family members, so long as such funds did not derive or originate

from Receivership Property, directly or indirectly, in whole or in part;

15. "Telemarketing" means any business activity (which includes, but is not limited to, initiating or receiving telephone calls, managing or contracting with others who initiate or receive telephone calls, operating an enterprise that initiates or receives telephone calls, owning an enterprise that initiates or receives telephone calls, or otherwise participating as an officer, director, employee or independent contractor in an enterprise that initiates or receives telephone calls) that involves attempts to induce consumers to purchase any item, good, or service, or to enter a contest for a prize, by means of telephone sales presentations, either exclusively or in conjunction with the use of other forms of marketing. *Provided* that, for the purpose of Section II.D of this Order, "telemarketing" shall be as defined as set forth in the Telemarketing Sales Rule, 16 C.F.R. § 310.2.

I. BAN ON CREDIT COUNSELING, CREDIT EDUCATION, OR DEBT MANAGEMENT

IT IS FURTHER ORDERED that Defendants are hereby pennanently restrained and enjoined from engaging in, participating in, or assisting others to engage or participate in credit counseling, credit education, or debt management. Nothing in this Order shall be read as an exception to this Section I.

II. PROHIBITED BUSINESS ACTIVITIES

IT IS FURTHER ORDERED that, in connection with the telemarketing of any good or service, Defendants, as well as their successors, assigns, officers, agents, servants, employees, or affiliates, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby pennanently restrained and enjoined from:

A. making, or causing or assisting others to make, expressly or by implication, any false or misleading representation, including but not limited to misrepresenting:

1. the existence, absence, terms, or amount of any fees, contributions, monies, or other costs, whether monetary or in kind, associated with the goods or services;

2. that no profits are being made from the goods or services provided;

3. any restriction, limitation, or condition to purchase the goods or services;

4. any aspect of the performance, efficacy, nature, or central characteristics of the goods or services; and

5. any other matter regarding the goods or services;

B. requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or

improve, a person's credit history, credit record, or credit rating until:

1. the time frame in which the defendant has represented all of the goods or services will be provided to that person has expired; and

2. the defendant has provided the person with the documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved;

C. requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the defendant has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person; and

D. violating the Telemarketing Sales Rule, 16 C.F.R. Part 310.

III. MONETARY RELIEF

IT IS FURTHER ORDERED that:

A. Judgment is hereby entered in favor of the Commission and against Defendants Pukke and DebtWorks, jointly and severally, in the amount of ONE HUNDRED SEVENTY-TWO MILLION DOLLARS ($172,000,000) (the "Judgment").

B. Except as provided in Sections III.D. and IV of this Order, the Judgment shall be suspended if the Defendants satisfY the following conditions:

1. Defendants acknowledge that the Receivership Property is comprised of Assets held in constructive trust under applicable state law and irrevocably assign, waive, release, discharge, and disclaim to the Commission any and all right, title, interest, and claims, known and unknown, that either Defendant has or may have in, to or against any and all Receivership Property; *provided however,* that Pukke and anyone residing with him may continue to reside at the Receivership Property located at 31 Linda Isle, Newport Beach, California 92660 ("Linda Isle property") until ten (10) days prior to the closing of a contract for sale of the property or 180 days after the date of entry of this Order, whichever occurs first, at which time he and anyone residing with him must vacate the property, so long as Pukke, and anyone residing at that address with him, (1) fully cooperate with the Receiver's efforts to market and sell the property, including granting the Receiver or its agents access to the property to show it to prospective buyers upon twenty-four (24) hour telephonic notice at Pukke's telephone number to be provided to the Receiver upon the date of entry of this Order; (2) do not interfere with such sale; and (3) do not by action or inaction

reduce the value of the property; *provided further* that Pukke may retain his personal furnishings located in the residence at the Linda Isle property;

2. Pukke releases and waives any statutory, common law, or other homestead exemption, including tenancy by the entirety protection, that may apply to the Linda Isle property or to any other real or personal property in which Pukke has any interest as of the date of entry of this Order and shall not declare or claim any homestead exemption in the Linda Isle Property, or such other property. Pukke also releases and waives any statutory, common law or other exemption in any and all assets, real or personal, constituting Receivership Property;

3. Pukke shall cooperate fully with the Commission and be responsible for preparing, executing, and recording the necessary documents and taking any additional actions the Commission deems necessary or desirable to evidence and effect the assignment, waiver, release, discharge, and disclaimer to the Commission of his right, title, interest, and claims in, to or against the assets constituting Receivership Property and to carry out the purposes of this Order; and

4. Within three (3) business days of execution of this Order by both Plaintiff and Defendants, Pukke shall file a

motion in the Pukke Bankruptcy Case to obtain that court's permission to enter into this Order and take any and all actions necessary and appropriate to implement and effectuate this Order. Any plan of reorganization or liquidation proposed by Defendant Pukke or otherwise confirmed in the Pukke Bankruptcy Case, pursuant to 11 U.S.C. § 1129, shall be consistent with the terms of this Order and shall not modify or otherwise supersede this Order, including the District Court's exclusive jurisdiction to interpret and enforce this Order.

5. If the Defendants satisfy all of the conditions described in this Section III.B. and except as provided in Sections III.D. and IV of this Order, the Judgment against Defendants shall be suspended, and the FTC agrees that it will not participate in any distribution to creditors in the Pukke Bankruptcy Case or file a complaint for nondischargeability or take any other action to determine nondischargeability of the Judgment owed to the FTC under Section IIILA. of this Order.

C. If Defendants do not satisfy the conditions set forth in Section III.B.:

1. The Judgment shall not be suspended, and Defendants shall owe the FTC $172,000,000, the approximate amount of consumer injury alleged in Plaintiffs complaint;

2. The FTC shall hold an allowed, general non-priority unsecured claim against Pukke in the Pukke Bankruptcy Case pursuant to 11 U.S.C. § 502 in the amount of ONE HUNDRED SEVENTY-TWO MILLION DOLLARS ($172,000,000), and the FTC shall receive any distribution to which it is entitled under the priorities of the Bankruptcy Code in the Pukke Bankruptcy Case;

3. Pukke shall not oppose any motion by the FTC for the appointment of a trustee in the Pukke Bankruptcy Case, but the FTC agrees that it will not nominate or otherwise propose the Receiver to serve as the trustee; and

4. The FTC reserves its right to file a complaint to determine the nondischargeability of the Judgment owed to the FTC under Section III.A. of this Order. Pukke agrees that the deadline for the FTC to file any such complaint to determine nondischargeability shall be up to and including the effective date of any plan confirmed in the Pukke Bankruptcy Case or the date on which the Pukke Bankruptcy Case is closed, whichever is later.

D. The Receiver shall marshal and liquidate the Receivership Property in accordance with Section IX of this Order, and turn over monies to the FTC in accordance with Section IX.O. of the Order. If the Net Monies derived from

liquidation of the Receivership Property exceed $35 million, the FTC agrees to accept THIRTYFIVE MILLION DOLLARS ($35,000,000) in satisfaction of its Judgment, and any Net Monies exceeding $35,000,000 shall be turned over to the Pukke Bankruptcy Estate for distribution in accordance with the priorities of the Bankruptcy Code. *Provided however* that if for any reason the Receiver is precluded from turning over any Net Monies to the FTC as set forth herein or such Net Monies are determined to belong to the Pukke Bankruptcy Estate, then (1) the FTC shall hold an allowed, general non-priority unsecured claim against Pukke in the Pukke Bankruptcy Case pursuant to 11 U.S.c. § 502 in the amount of ONE HUNDRED SEVENTY-TWO MILLION DOLLARS ($172,000,000), (2) the FTC shall receive any distribution to which it is entitled under the priorities of the Bankruptcy Code in the Pukke Bankruptcy Case, and (3) the FTC agrees that it will not file a complaint for nondischargeability or take any other action to determine nondischargeability except as provided in Section IV.C. of this Order; *provided further* that Pukke shall not oppose any motion by the FTC for the appointment of a trustee in the Pukke Bankruptcy Case, but the FTC agrees that it will not nominate or otherwise propose the Receiver to serve as the trustee.

E. Any and all funds paid pursuant to this Order shall be paid by electronic funds transfer pursuant to instructions provided by the Commission for deposit into a fund administered by the Commission or its agents for equitable relief including, but not limited

to, consumer redress and any attendant expenses for the administration of any redress fund. If the related settlement in the Nationwide Class Action receives final approval and the Nationwide Class prevails on any appeal noticed from that settlement, the FTC and counsel for the plaintiffs in the Nationwide Class Action shall agree upon a program whereby the funds will be distributed fairly to class members in the Nationwide Class Action, and for plaintiffs' attorneys' fees and costs as approved by the Court in the Nationwide Class Action, *provided, however*, that the FTC reserves the right to object to the amount of attorneys fees and costs requested by plaintiffs' counsel in the Nationwide Class Action. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC, in consultation with plaintiffs' counsel in the Nationwide Class Action, may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices as alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies under this Subsection.

F. Except as otherwise provided herein, Defendants relinquish all dominion, control and title to the funds and assets comprising Receivership Property and to funds paid to the FTC pursuant to this Order. Defendants shall

make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise.

G. All funds paid pursuant to this Order are equitable monetary relief, solely remedial in nature, and not a fine, penalty, punitive assessment, or forfeiture; and

H. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the FTC their tax identification numbers, which shall be used for purposes of collecting and reporting any delinquent amounts arising out of this Order.

IV. TERMINATION OF SUSPENSION

IT IS FURTHER ORDERED that:

A. The Commission's agreement to, and the Court's approval of, this Order as to Defendants is expressly premised upon the truthfulness, accuracy, and completeness of Defendants' financial condition, as represented in DebtWorks' financial statement dated May 2, 2005, and Pukke's financial statement dated January 5, 2006, upon which the Commission relied in negotiating and agreeing to the terms of this Order. By agreeing to this Order, Defendants reaffirm and attest to the truthfulness, accuracy, and completeness of these financial statements.

B. If, upon motion by the Commission, this Court finds that any Defendant possessed, in whole or in part, of record or beneficially, any Asset

not disclosed in the Defendants' financial statements that constitutes Receivership Property and that is exempt from the Pukke Bankruptcy Estate, such Asset, or the fair market value thereof, calculated as of the date of entry of this Order or the date of turnover of the Asset, whichever value is greater, shall be turned over to the FTC by that Defendant within ten (10) days and shall be used for consumer redress in accordance with this Order. *Provided* that in all other respects this Judgment shall remain in full force and effect unless otherwise ordered by this Court, and that proceedings instituted under this section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings the FTC may initiate to enforce this Order.

C. The FTC reserves its right to file a complaint to determine the nondischargeability of any debt determined to be owed to the FTC under Section IV.B. of this Order. Pukke agrees that the deadline for the FTC to file any such complaint to determine nondischargeability of such debt shall be up to and including the effective date of any plan confirmed in the Pukke Bankruptcy Case or the date on which the Pukke Bankruptcy Case is closed, whichever is later.

V. EFFECT OF NATIONWIDE CLASS ACTION SETTLEMENT

IT IS FURTHER ORDERED that the claims settled in this Order shall be distinct and severable from any claims advanced by the plaintiffs in the Nationwide Class Action and settled with

Defendants. If the United States District Court for the District of Maryland or any appeals court should decline to certify, decertify, or refuse to approve the settlement of any such claims, that decision shall not affect either the implementation of the Redress Program or the terms of this Order, and nothing in this Order shall be used as evidence against the Defendants in the Nationwide Class Action.

VI. COORDINATION WITH NATIONWIDE CLASS ACTION

IT IS FURTHER ORDERED that the FTC and counsel for the plaintiffs in the Nationwide Class Action shall negotiate and agree upon the content and manner of dissemination of a notice of the parallel settlement achieved in the Nationwide Class Action (the "Notice"), which must be submitted to and approved by the United States District Court for the District of Maryland in the Nationwide Class Action. Upon approval of such settlement, the FTC and counsel for the plaintiffs in the Nationwide Class Action shall negotiate and agree upon the manner of dissemination of the distribution to any class members of the Nationwide Class Action. Class members in the Nationwide Class Action that receive redress through the FTC Redress Program shall be notified that the distribution constitutes a distribution from the Nationwide Class Action and satisfies the Nationwide Class Action's obligations to those consumers. The Nationwide Class Action plaintiffs shall bear all costs associated with dissemination of the Notice. In addition, plaintiffs' counsel in the Nationwide Class Action shall bear all costs associated with receiving and processing consumers' requests for exclusion ("opt outs") from the class. Plaintiffs' counsel in the Nationwide Class Action shall not be responsible for any costs directly

related to the FTC's redress program (*e.g.*, the FTC's provision of redress checks to consumers).

VII. REDRESS PROGRAM ADMINISTRATION

IT IS FURTHER ORDERED that the Redress Program shall be established and administered by the FTC in its sole discretion for the purpose of providing consumer redress. The FTC, in consultation with plaintiffs' counsel in the Nationwide Class Action, shall determine the plan for the disbursement of the funds to consumers in the Nationwide Class Action. The FTC, in its sole discretion, shall assign the administration of the Redress Program to one of its approved contractors (Redress Program Administrator). Defendants shall have no right to contest the substance or manner of distribution of redress (including any attendant costs), nor the FTC's selection of the Redress Program Administrator.

VIII. COOPERATION WITH GOVERNMENT COUNSEL

IT IS FURTHER ORDERED that Pukke shall, in connection with this action and in connection with the Pukke Bankruptcy Case, cooperate in good faith with the FTC and appear at such places and at such times as the FTC shall reasonably request for interviews, conferences, pretrial discovery, review of documents, and for other matters as may be reasonably requested by the FTC. If requested in writing by the FTC, Pukke shall appear and provide testimony under oath in any trial, without the service of a subpoena. Cooperation by Pukke shall not require Pukke to waive his constitutional right against self-incrimination and right to counsel.

IX. RECEIVERSHIP PROVISIONS

IT IS FURTHER ORDERED that Robb Evans & Associates LLP is appointed as Permanent Receiver ("Receiver"), with the full power of an equity receiver over all the Receivership Property, with directions and authority to accomplish the following:

A. Within three (3) business days of entry of this Order, release to Pukke from funds held in constructive trust, as payment for Pukke's living expenses incurred since April 20, 2005, ONE HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($125,000). The Receiver shall release no further funds held in constructive trust for the payment of Pukke's living expenses;

B. Upon Pukke's execution of this agreement and with this Court's approval, withdraw any freeze on Pukke's existing personal credit cards so that Pukke may use such credit cards; *provided however*, that Pukke, not the Receivership, shall be obligated to pay any and all debts incurred thereafter on Pukke's credit cards; *provided further* that Pukke's use of said credit cards shall be in accordance with the Bankruptcy Code and applicable Bankruptcy rules;

C. Upon court order, entered in this action or in the Pukke Bankruptcy Case after notice to parties in interest, release from funds held in constructive trust TWO HUNDRED TWENTY-TWO THOUSAND DOLLARS ($222,000) to the Jones Day law firm in payment of Pukke's attorneys fees and costs

logged by the Jones Day law firm in defending this action through December 29, 2005. Neither the FTC nor the Receiver shall object to this payment or contest or seek disgorgement of payments previously received by the Jones Day law firm in connection with this action. In addition, upon court order, entered in this action or in the Pukke Bankruptcy Case after notice to parties in interest, the Receiver shall release from funds held in constructive trust up to an additional SEVENTY –EIGHT THOUSAND DOLLARS ($78,000) for the payment of attorneys fees or other costs of administration in the Pukke Bankruptcy Case. In no event shall any monies released pursuant to this Section IX.C. revert to Pukke personally. Except as provided in this Section, the Receiver shall release no further funds to Defendants for any reason. Nothing in this Section mitigates or contravenes Defendants' stipulation and this Court's finding that (1) any and all funds and assets that comprise Receivership Property were derived from payments by consumers as an alleged consequence of the acts and practices alleged in the FTC's complaint; (2) Defendants do not have a legitimate claim to those funds; and (3) any and all funds paid pursuant to this Order are held in constructive trust for consumers;

D. The Receiver and the FTC shall not seek disgorgement or otherwise contest payments previously made to the law firm of Collier Shannon Scott for attorneys fees and costs in connection with its defense of this matter, *provided that* Collier Shannon Scott, within three (3) business days of entry of this Order,

withdraws and abandons any claim in the Pukke Bankruptcy Case for outstanding, unpaid attorneys fees and costs;

E. In attempting to sell and liquidate a lot of real property constituting Receivership Property located in Centerpoint, New York, the Receiver shall consider any offer received by Pukke's father, Janis Pukke, to purchase said property, and allow Janis Pukke the right of first refusal to purchase the property at fair market value; *provided however,* the Receiver may put the property up for sale on the open market and consider any offers received in determining the fair market value of the property, and may sell the property to a bidder with a higher or better offer if Janis Pukke declines to match or exceed all material terms of the offer; *provided further* that the Receiver may take all steps necessary, including the taking of Janis Pukke's deposition, to assure itself that any funds to be used by Janis Pukke to purchase the property do not constitute Receivership Property, and may refuse to sell the property to Janis Pukke if any such funds constitute Receivership Property;

F. Maintain full control of the Receivership Property;

G. Maintain custody, control, and possession of all Assets, including the funds, property, premises, accounts, mail and other assets constituting Receivership Property, wherever situated, the income and profits therefrom, and all sums of money now or hereafter due or owing to the Receivership, with full power to:

collect, receive, and take possession of all Assets, including goods, chattels, rights, credits, monies, effects, lands, leases, books and records, work papers, and records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of the Receivership and customers of the Receivership whose interest are now held by or under the direction, possession, custody, or control of the Receivership;

H. Continue performing all reasonable efforts to determine the nature, location, and value of all Receivership Property;

I. Engage and employ, with the approval of the Court, accountants and money managers ("Retained Professionals"). The Receiver may employ without the approval ofthe Court other individuals or entities that the Receiver deems necessary to assist it in its duties in the ordinary course of the Receivership's business, including, but not limited to, foreign attorneys and accountants, realtors, appraisers and auctioneers ("Ordinary Course Professionals and Vendors"). The Receiver may compensate the Ordinary Course Professionals and Vendors in the ordinary course but, may, in its discretion, seek the approval of the Court in advance of approving payments to such persons. The Retained Professionals and counsel of record for the Receiver may only be compensated pursuant to order of the Court;

J. Take such action as the Receiver deems appropriate to prevent the dissipation or

concealment of any Assets constituting Receivership Property and otherwise preserve any such Assets;

K. Liquidate Assets constituting Receivership Property in accordance with the terms of this Order or any prior or subsequent order of this Court; and to transfer Receivership Property to storage facilities, cancel leases, and reject and enter contracts;

L. Oversee the operations of any and all businesses owned or controlled by Defendants that otherwise constitute Receivership Property;

M. Bring such legal actions based on law or equity in any state, federal, or foreign court as it deems necessary or appropriate in discharging its duties as Receiver relating to the location, marshaling, and management of Assets constituting Receivership Property;

N. Immediately enforce the monetary judgment set forth in Section III of this Order by taking all necessary or appropriate post-judgment collection steps, including but not limited to obtaining and levying writs of execution and creating, perfecting and enforcing judgment liens on any real or personal property of the Defendants that constitutes Receivership Property;

O. After all Assets that constitute Receivership Property have been liquidated, the Receiver shall tum over no more than THIRTY-FIVE MILLION ($35,000,000) from Net Monies to the FTC in accordance with Section III of this

Order. Notwithstanding that such monies represent funds held in constructive trust for consumers, the Receiver shall tum over any monies exceeding $35,000,000 to the Pukke Bankruptcy Estate for distribution to creditors in accordance with the priorities of the Bankruptcy Code. The FTC reserves the right to request that the Court order the Receiver to distribute funds on an interim basis to the FTC prior to winding up liquidation of the Receivership Property; and

P. The Receiver shall pay all taxes and other approved expenses from Receivership Property and provide a final accounting (1) within thirty (30) days after the Receiver winds up liquidation and distribution of the Receivership Property or (2) upon Court order at the request of the FTC.

IT IS FURTHER ORDERED that, to the extent they are not inconsistent with this Order, all powers granted to the Receiver pursuant to this Court's order of April 20, 2005, shall remain in full force and effect.

X. COMPENSATION OF RECEIVER

IT IS FURTHER ORDERED that the Receiver and those he employs are entitled to reasonable compensation for the performance of their duties pursuant to this Order and for the costs of actual out-of-pocket expenses incurred by them, from the Assets constituting Receivership Property. The Receiver and the Retained Professionals shall apply to the Court for such compensation and expense.

XI. COOPERATION WITH RECEIVER

IT IS FURTHER ORDERED that the undersigned shall cooperate fully with the Receiver in: (A)assisting the Receiver in defending any and all actions or claims brought against the Receiver or the Receivership Property by other persons or entities; (B) executing any documents necessary to transfer assets or ownership interest to the Receiver pursuant to the terms ofthis Order; and (C) refraining from any act that would interfere or impede the Receiver in the execution of the performance of his duties. Pukke shall cooperate in good faith with the Receiver and appear at such places and at such times as the Receiver shall reasonably request for deposition testimony, interviews, conferences, review of documents, and for other matters as may be reasonably requested by the Receiver, without the service of a subpoena. Cooperation by Pukke shall not require Pukke to waive his constitutional right against self-incrimination, but Pukke agrees that he will not assert this right with respect to his Assets and the Receiver's attempts to locate, marshal, and liquidate Receivership Property.

XII. MAINTENANCE OF ASSET FREEZE

IT IS FURTHER ORDERED that, except as provided herein, the freeze of the Assets by the Court's order dated April 20, 2005 shall remain in effect, except as necessary for the Receiver to liquidate all Receivership Property, until the Receiver concludes all activities required to wind up the Receivership. *Provided however*, that nothing in this Order shall (1) prohibit Pukke from seeking gainful employment in accordance with Sections I and II of this Order; or (2) prohibit Pukke from using

income earned through such employment, money released for his living expenses pursuant to Section IX of this Order, or funds given to Pukke by his friends and family members, so long as such funds did not derive or originate from Receivership Property, directly or indirectly, in whole or in part.

XIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER

IT IS FURTHER ORDERED that Defendants, within five (5) business days after receipt of this Order as entered by the Court, each must submit to the Commission a truthful sworn statement acknowledging receipt of this Order, in the form set forth in Attachment A to this Order.

XIV. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver copies ofthe Order as directed below:

A. DebtWorks shall deliver a copy of this Order to all of its principals, officers, directors, and managers. DebtWorks shall also deliver copies of this Order to all of its employees, agents, and representatives who engage in conduct related to the subject matter ofthe Order. For current personnel, delivery shall be within five (5) days of service of this Order upon DebtWorks. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. For any business that Pukke controls, directly or indirectly, or in which Pukke has a majority ownership interest, Pukke shall deliver a copy of this Order to all principals, officers, directors, and managers of that business. Pukke shall also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of Sections I and Hof the Order. For current personnel, delivery shall be within five (5) days of service of this Order upon Pukke. New personnel shall be given copies of this Order at least one (1) business day before they start work.

C. For any business where Pukke is not a controlling person of the business but otherwise engages in conduct related to the subject matter of Sections I and II of the Order, Pukke shall deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

D. Defendants shall secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

XV. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry ofthis Order, in connection with the marketing, providing, or assisting in the marketing or providing of credit counseling, credit education, or debt management or in the telemarketing of any good or service, Defendants and their agents, employees, officers,

corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly, or through any third party) and any responses to those complaints or requests;

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each

provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by Section XIII and XIV of this Order, and all reports submitted to the FTC pursuant to Section XVI of this Order.

XVI. COMPLIANCE REPORTING BY DEFENDANTS

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order,

(1) Pukke shall notify the Commission of the following:

(a) Any changes in residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

(b) Any changes in employment status (including self-employment) of Pukke, and any change in the ownership of Pukke in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that Pukke is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a

statement of Pukke's duties and responsibilities in connection with the business or employment; and

(c) Any changes in Pukke's name or use of any aliases or fictitious names; and

(2) Defendants shall notify the Commission of any changes in corporate structure of DebtWorks or any business entity that Pukke directly or indirectly control(s), or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which the Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Order, Defendants shall each provide a written report to the FTC, sworn to

under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

(1) The then-current residence address, mailing addresses, and telephone numbers of Pukke;

(2) The then-current employment and business addresses and telephone numbers of Pukke, a description of the business activities of each such employer or business, and the title and responsibilities of Pukke, for each such employer or business;

(3) A copy of each acknowledgment of receipt of this Order, obtained pursuant to Section XIII and *XIV;* and

(4) Any other changes required to be reported under subparagraph A of this Section.

C. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with Defendants.

XVII. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within ten (10) days of receipt of written notice from a representative of the Commission, each Defendant shall submit

additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

(1) obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

(2) posing as consumers and suppliers to Defendants' employees, or any other entity managed or controlled in whole or in part by Pukke or DebtWorks, without the necessity of identification or prior notice; and

C. Defendants each shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

Provided, however, that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-l, to obtain any documentary material, tangible things, testimony, or

information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

XVIII. AUTOMATIC STAY

IT IS FURTHER ORDERED that, to the extent necessary to effectuate the provisions of this Order, the automatic stay in the Pukke Bankruptcy Case pursuant to 11 U.S.C. § 362 shall be and hereby is terminated as to the FTC and the Receiver.

XIX. NONINTERFERENCE WITH RECEIVER

IT IS FURTHER ORDERED that all clients and vendors of Defendants, creditors and other persons, and all others acting on behalf of any such client, vendor, creditor or other persons, including sheriffs, marshals, other officers, deputies, servants, agents, employees, and attorneys, are stayed from:

A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against the Receivership Property, except that such actions may be filed to toll any statutes of limitations;

B. Using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any portion of the Receivership property, wherever situated;

C. Attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage,

indebtedness, security agreement or other agreement affecting the Receivership Property;

D. Doing any act to interfere with the taking control, possession, management, or sale by the Receiver, of any portion of the Receivership Property, or to in any way interfere with or harass the Receiver, or to interfere in any manner with the exclusive jurisdiction of the Court over the Receivership Property.

Provided, however, this provision shall not be construed to restrict:

1. The commencement or continuation of a criminal action or proceeding;

2. The commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

3. The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; or

4. The continuation of *In re AmeriDebt,* Case No. 04-23649-PM (Bankr. D. Md.), or the commencement and continuation of any suit or proceeding filed by the AmeriDebt Trustee.

XX. NOTIFICATIONS

IT IS FURTHER ORDERED that, for purposes of this Order, Defendants shall, unless

otherwise directed by the FTC or its authorized representatives, mail all written notifications to the FTC relating to this Order to:

Associate Director, Division of Enforcement
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Re: FTC v. AmeriDebt, et al.

For purposes of this Order, the FTC and Receiver shall, unless otherwise provided by this Order or otherwise directed by Defendants or their authorized representatives, mail all written notifications to Defendants relating to this Order to:

John B. Williams, Esq.
Jones Day
51 Louisiana Avenue, N. W.
Washington, D.C. 20001

XXI. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes, including construction, modification and enforcement of this Order.

IT IS SO ORDERED.

Dated: 5/16/06 /s/ C. Johnson
UNITED STATES DISTRICT COURT JUDGE

STIPULATED AND AGREED TO BY:

/s/ LUCY E. MORRIS
LUCY E. MORRIS
PEDER V.W. MAGEE
ALLISON L. BROWN
JAMIE HINE
Attorneys for Plaintiff, Federal Trade Commission
600 Pennsylvania Avenue, N. W.
Mail Stop NJ-3158
Washington, D.C. 20580
(202) 326-3295 (telephone)
(202) 326-3768 (facsimile)

Local Counsel
JEANNE M. CROUSE - #05329
RAMONA D. ELIOTT - #05738
Federal Trade Commission
600 Pennsylvania Avenue, N. W.
Mail Stop NJ-3158
Washington, D.C. 20580
(202) 326-3312 (telephone)
(202) 326-3799 (facsimile)

/s/ Andris Pukke
By: Andris Pukke, Individually and as president of DebtWorks, Inc. and as Chapter 11 Debtor

/s/ John B. Williams
By: John B. Williams, Esq.
Geoffrey S. Irwin, Esq.
Attorneys for Andris Pukke and DebtWorks, Inc.
And Special Counsel for Debtor Andris Pukke
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3678 (telephone)
(202) 626-1700 (facsimile)

Attachment A: Affidavit for Receipt of Final Order

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
AMERIDEBT, INC., et al.,
Defendants.
Civil No. PJM 03-3317

[Name of defendant], being duly sworn, hereby states and affirms as follows:

1. My name is . My current residence address IS

_____

_____ _

I am a citizen of and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.

2. I am a defendant in *Federal Trade Commission* v. *AmeriDebt, Inc., et al.* Civil No. PJM 03-3317 (United States District Court for the District of Maryland).

3. On , I received a copy of the Stipulated Order for Permanent Injunction and Final Judgment, which was signed by the Court, and entered by the Court on . A true and correct copy of the Order I received is appended to this Affidavit.

I declare under penalty of peIjury under the laws of the United States that the foregoing is true and correct. Executed on *[date]*, at *[city and state]*.

[Full name of Defendant]

State of , City of _____

Subscribed and sworn to before me this _ day of _____ , 2006.

My Commission Expires:

Notary Public

[Entered April 20, 2005]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION,

Plaintiff,

v. Civil Action No. PJM 03-3317

AMERIDEBT, INC., et al.,

Defendants.

PRELIMINARY INJUNCTION ORDER WITH ASSET FREEZE, APPOINTMENT OF A RECEIVER, REPATRIATION OF ASSETS, AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), having filed its Motion for Preliminary Injunction Including Asset Freeze, Accounting, and Repatriation of Assets against Defendants Andris Pukke and DebtWorks, Inc., pursuant to Fed. R. Civ. P. 65 and Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and the Court having considered all pleadings, memoranda of law, and exhibits concerning this matter, and having heard oral argument, and now being fully advised in the premises, finds that:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and over all parties, andvenue in this district is proper.

2. The Commission has shown it is likely to succeed on the merits of its claims that Defendants Andris Pukke and DebtWorks, Inc. have violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

3. The Commission has shown that an immediate asset freeze, accounting, repatriation of assets, and appointment of a receiver will increase the likelihood of preserving existing assets, pending final determination of this matter.

4. There is a possibility that, absent an asset freeze, Defendants Andris Pukke and DebtWorks, Inc., and others pursuant to their direction, on their behalf, or under their control, will transfer, conceal, dissipate, or otherwise divert their assets, thereby defeating the possibility of effective final relief in the form of equitable monetary relief for consumers.

5. The Commission has shown that Defendant Andris Pukke has transferred money from the United States, and that repatriation of Defendant Andris Pukke's funds to the United States will increase the likelihood of providing for effective final relief.

6. Good cause exists for appointing a Receiver for the Receivership Property.

7. The balance of the equities tips in favor of the Commission, and entry of this Order is in the public interest.

8. No security is required of any agency of the United States for issuance of a preliminary injunction. Fed. R. Civ. P. 65(c).

DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

A. "AmeriDebt Trustee" means Mark D. Taylor, the trustee appointed over AmeriDebt, Inc. in *In re AmeriDebt,* Case No. 04-23649-PM (Bankr. D. Md.).

B. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including, without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, interest in any trust, and all cash, wherever located, and shall include both existing Assets and Assets acquired after the date of entry of this Order. Further, the definition of Assets shall include all books, records, computer files, databases and other information that may be utilized to determine the existence of Assets, liabilities, or the location of property.

C. "DebtWorks" means DebtWorks, Inc., and its successors and assigns, whether acting directly or indirectly or through any other corporation, subsidiary, division, or other device.

D. "Defendants" means Andris Pukke and DebtWorks.

E. "Financial Institution" means any bank, savings and loan institution, credit union, or any financial depository of any kind, including but not limited to any brokerage house, trustee, brokerdealer, escrow agent, title company, or commodity trading company.

F. The term "including" in this Order shall mean "without limitation."

G. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

H. "*Polacsek* Class Representatives" means Alyssa Polacsek, Sarah Leoni, Greg Cavataio and Felicia Robinson, and counsel to the class appointed by Order of the Court dated November 4, 2004, in *Polacsek, et al. v. Debticated Consumer Counseling, Inc., et al.*, Civil Action No. 8:04-cv-0631 PJM.

I. "Pukke" means Andris Pukke, individually and as the owner of DebtWorks, whether acting directly or indirectly or through any corporation or other device.

J. "Receiver" shall mean the receiver appointed in Paragraph VI of this Order and any deputy receivers that may be named by the receiver.

K. "Receivership Property" means any Assets, wherever located, that are (1) owned, controlled or held by or for the benefit of Pukke or DebtWorks, in whole or in part; (2) in the actual or constructive possession of Pukke or DebtWorks; (3) held by an agent of Pukke or DebtWorks, including as a retainer for the agent's provision of services to either or both of them; or (4) owned, controlled or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks, including The P Family Trust, The P II

Family Trust, and The Pukke 2002 Family Irrevocable Trust.

ORDER

I. ASSET FREEZE

IT IS HEREBY ORDERED that Defendants Pukke and DebtWorks, their successors and assigns, and their officers, agents, servants, employees, affiliates, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly or through any corporation, subsidiary, division, trust, or other device, are hereby restrained and enjoined from:

A. Transferring, liquidating, converting, loaning, gifting, encumbering, selling, concealing, pledging, hypothecating, assigning, spending, withdrawing, disbursing, conveying, dissipating, or otherwise disposing of any funds, property, shares of stock, interest in any trust, or other Assets, or any interest therein, wherever located, that are (1) owned, controlled or held by, or for the benefit of Pukke or DebtWorks, in whole or in part; (2) in the actual or constructive possession of Pukke or DebtWorks; (3) held by an agent of Pukke or DebtWorks, including as a retainer for the agent's provision of services to either of them; or (4) owned, controlled or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks, including The P Family Trust, The P II Family Trust, and The Pukke 2002 Family Irrevocable Trust;

B. Opening or causing to be opened any safe deposit box, commercial mail box, or storage facility (1) titled in the name of Pukke or DebtWorks, or any corporation, partnership, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks, or (2) subject to access by Pukke or DebtWorks, or any corporation, partnership, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks; and

C. Incurring charges or cash advances on any credit or debit card issued in the name, singly or jointly, of Pukke or DebtWorks, or any corporation, partnership, or other entity directly or indirectly owned or controlled by either Pukke or DebtWorks.

Provided however, that, notwithstanding the asset freeze provisions of Sub-parts A-C above, nothing in this Order shall (1) prohibit Defendant Pukke from seeking gainful employment not related to the activities described in the Complaint; (2) prohibit Defendant Pukke from paying, from income earned through such employment, for reasonable and necessary living expenses and reasonable attorneys' fees, or from other funds, after written prior approval by the Receiver or by the Court; or (3) prohibit Defendant DebtWorks from paying for reasonable attorneys' fees, after written prior approval by the Receiver or by the Court. ***Provided further***, that no living expenses or attorneys' fees shall be paid from Assets subject to this Order unless and until the Receiver or the Court has determined that Defendants Pukke and DebtWorks have completed and provided the accountings required by Paragraphs II and IV of this Order.

II. ACCOUNTING

IT IS FURTHER ORDERED that each Defendant shall:

A. Within ten (10) business days following service of this Order, provide to the Receiver, the Commission, the AmeriDebt Trustee, and counsel for the *Polacsek* Class Representatives a full accounting, verified under oath and accurate, of all Assets that are held, jointly or singly: (1) by them; (2) for their benefit; (3) in trust by or for them, individually or jointly; or (4) under their direct or indirect control. Such accounting shall include the names, addresses, and telephone numbers of all Financial Institutions or other entities or persons holding such Assets, the name of the account representative, and the account numbers and balances. The accounting shall include all financial information as requested in, and be submitted in the form of, the Department of Treasury - Internal Revenue Service Collection Information Statement for Individuals (Form 433-A, located at www.irs.gov/pub/irs-pdf/f433a.pdf, for Pukke) and the corresponding Collection Information Statement for Businesses (Form 433-B, located at www.irs.gov/pub/irs-pdf/f433b.pdf, for DebtWorks).

B. Within ten (10) business days following service of this Order, provide to the Receiver, the Commission, the AmeriDebt Trustee, and counsel for the *Polacsek* Class Representatives a completed statement, verified under oath and accurate, of all payments, transfers, or assignment of Assets made by Defendants, in the amount of $10,000 or more, since May 17, 2002. Such statement shall include (a) the amount transferred or assigned; (b) the name, address and telephone number of the transferor or

assignor; (c) the name, address and telephone number of each transferee or assignee; (d) the date of the assignment or transfer; (e) the type and amount of consideration for any payment; and (f) the method of transfer, *e.g.*, wire transfer, and the name and address of the entity or person directing or accomplishing the transfer.

C. Within ten (10) business days of any material change in the information contained in the financial statements required above, or any other material change to the financial condition of a Defendant, provide the Receiver, the Commission, the AmeriDebt Trustee, and counsel for the *Polacsek* Class Representatives with an amended financial statement to reflect such change.

III. CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), any consumer reporting agency may furnish a consumer report concerning Defendants DebtWorks or Pukke.

IV. FOREIGN ASSET REPATRIATION

IT IS FURTHER ORDERED that within ten (10) business days following service of this Order, Defendants shall:

A. Transfer to the United States all Assets outside the United States held, jointly or singly: (1) by them; (2) for their benefit; (3) in trust by them or for them individually or jointly; or (4) under their direct or indirect control, including any Assets held in The P Family Trust and The P II Family Trust.

B. Provide the Receiver, the Commission, the AmeriDebt Trustee, and counsel for the *Polacsek* Class Representatives with a full accounting, verified under oath and accurate, of all Assets outside of the territory of the United States that are held, jointly or singly: (1) by them; (2) for their benefit; (3) in trust by or for them, individually or jointly; or (4) under their direct or indirect control. Such accounting shall include the names, addresses, telephone numbers, and facsimile numbers of all Financial Institutions or other entities or persons holding such Assets, along with the account numbers and balances.

C. On the same business day as any transfer under Paragraph IV.A. above, notify the Receiver, the Commission, the AmeriDebt Trustee, and counsel for the *Polacsek* Class Representatives, of the names, addresses, telephone numbers, facsimile numbers, and account representatives of all Financial Institutions or other entities that are the recipients of such Assets.

D. Hold and retain all repatriated Assets and prevent any transfer, disposition, or dissipation whatsoever of any such Assets, except that Pukke may pay for reasonable and necessary living expenses and reasonable attorneys' fees, after written prior approval by the Receiver or the Court, and except as specifically provided in this order.

E. Provide the Receiver and the Commission full and complete access to Defendants' records and documents held by Financial Institutions outside of the territorial United States, by signing and delivering to the Receiver and the Commission the Consent to Release of Financial Records attached to this Order as Attachment A.

V. NONINTERFERENCE WITH REPATRIATION

IT IS FURTHER ORDERED that Defendants Pukke and DebtWorks, their successors and assigns, and their officers, agents, servants, employees, affiliates, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign Assets, or in the hindrance of the repatriation required by the preceding Paragraph of this Order, including, but not limited to:

A. Sending any statement, letter, fax, email or wire transmission, or telephoning or engaging in any other act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a "duress" event has occurred under the terms of a foreign trust agreement until such time that all Assets have been fully repatriated pursuant to Paragraph IV of this Order;

B. Notifying any trustee, trust protector, or other agent of any foreign trust or other related entities of either the existence of this Order, or of the fact that repatriation is required pursuant to a court order, until such time that all Assets have been fully repatriated pursuant to Paragraph IV of this Order.

VI. APPOINTMENT OF RECEIVER

IT IS FURTHER ORDERED that Robb Evans and Associates, LLC, Sun Valley, California is appointed receiver ("Receiver") to marshal, conserve, protect, and operate Receivership Property,

wherever such Assets may be found, and, with the approval of the Court, dispose of any wasting Assets of Defendants Pukke and DebtWorks.

A. The Receiver shall have the following powers and duties to fulfill its obligations:

1. Use reasonable efforts to determine the nature, location, and value of all Receivership Property;

2. Take custody, control, and possession of Assets constituting Receivership Property;

3. Conserve, hold, and manage all Assets constituting Receivership Property, pending further order of this Court;

4. Engage and employ, with the approval of the Court, accountants and money managers ("Retained Professionals"). The Receiver may employ without the approval of the Court other individuals or entities that the Receiver deems necessary to assist it in its duties in the ordinary course of the receivership's business, including, but not limited to, out of state counsel, foreign attorneys and accountants, realtors, appraisers and auctioneers ("Ordinary Course Professionals and Vendors") (collectively, the "Retained Personnel"). The Receiver may compensate the Ordinary Course Professionals and Vendors in the ordinary course but may, in its discretion, seek the approval of the Court in advance of approving payments to such persons. The Retained Professionals may only be compensated pursuant to order of the Court;

5. Take such action as the Receiver deems appropriate to prevent the dissipation or concealment of any Assets constituting Receivership Property and otherwise preserve any such Assets;

6. Oversee the operations of any and all businesses owned or controlled by Defendants or otherwise constituting a part of the Receivership Property;

7. Bring such legal actions based on law or equity in any state, federal, or foreign court as it deems necessary or appropriate in discharging its duties as Receiver relating to the location, marshaling and management of Assets constituting Receivership Property, and enforcement of this Order; and

8. Cooperate with reasonable requests for information or assistance from any state or federal law enforcement agency. So long as the Receiver agrees to be bound by the protective order in this case, titled Stipulated Order Regarding Confidentiality of Discovery Materials and entered on November 10, 2004, the FTC and the Receiver may exchange information deemed confidential under the protective order.

B. The Receiver is entitled to reasonable compensation and expense reimbursement from the Receivership Property. Such compensation shall be in amounts commensurate with the services performed by the Receiver and shall be subject to the approval of the Court. The Receiver and the Retained Professionals shall apply to the Court for such compensation and expense, and such amounts shall be paid from the Assets constituting

Receivership Property, and any extensions, renewals or modifications thereof.

C. The Receiver shall be required to file with the Clerk of the Court a receiver's bond in the sum of $50,000 with sureties to be approved by the Court, conditioned that the Receiver will well and truly perform the duties of the office and abide by and perform all acts the Court directs. The FTC reserves the right to ask the Court to increase the amount of the bond.

D. The Receiver and Retained Personnel are entitled to rely on all outstanding rules of law and Court orders and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by the Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

E. The Receiver shall establish one or more bank account(s), in its discretion, to deposit Defendants' frozen funds and any other funds the Receiver may recover. The Receiver shall use such funds for any legitimate purpose consistent with the Receiver's powers and duties and this Order, including paying fees and expenses of the Receiver and Retained Personnel, as approved by the Court.

VII. COOPERATION WITH RECEIVER

IT IS FURTHER ORDERED that Defendants and all other persons or entities served with a copy of this Order shall fully cooperate with and assist the Receiver in taking and maintaining possession, custody, or control of Receivership Property. This cooperation and assistance shall include, but not be limited to: providing information to the Receiver that the Receiver deems necessary in order to exercise the authority and discharge the responsibilities of the Receiver under this Order; providing any password required to access any computer, electronic file, or telephonic data in any medium; advising all persons who owe money to the Defendants that all debts should be paid directly to the Receiver; transferring funds at the Receivers' direction; and producing records related to the assets and sales of the Receivership Property. The entities obligated to cooperate with the Receiver under this provision include, but are not limited to, banks, broker-dealers, savings and loans, escrow agents, title companies, commodity trading companies, precious metals dealers and other Financial Institutions and depcsitories of any kind, and all third-party billing agents, common carriers, and other telecommunications companies, that have transacted business with Defendants.

VIII. DELIVERY OF RECEIVERSHIP PROPERTY

IT IS FURTHER ORDERED that:

A. Immediately upon service of this Order upon them, or within such period as may be permitted by the Receiver, Defendants or any other

person or entity shall transfer or deliver possession, custody, and control of the following to the Receiver:

1. All Receivership Property;

2. All documents of the Receivership Property, including but not limited to, books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), title documents and other papers; and

3. All keys, codes and passwords necessary to gain or to secure access to any Assets constituting Receivership Property;

Provided, however, that this provision does not apply to any Assets in the possession, custody, or control of the AmeriDebt Trustee.

B. In the event any person or entity fails to deliver or transfer any Receivership property or otherwise fails to comply with any provision of this Section, the Receiver may file *ex parte* an Affidavit of Non-Compliance regarding the failure. Upon filing of the affidavit, the Court may authorize, without additional process or demand, Writs of Possession or Sequestration or other equitable writs requested by the Receiver. The writs shall authorize and direct the United States Marshal or any sheriff or deputy sheriff of any county, or any other federal or state law enforcement officer, to seize the Receivership Property or document, or other thing, and to deliver it to the Receiver.

IX. RETENTION OF ASSETS AND DOCUMENTS BY THIRD PARTIES

IT IS FURTHER ORDERED that any Financial Institution, other entity or person served with a copy of this Order shall:

A. Hold and retain, except as specifically provided in this order, within such financial institution's, other entity's or person's control, and prohibit the withdrawal, removal, assignment, transfer, pledge, hypothecation, encumbrance, disbursement, dissipation, conversion, sale, liquidation, or other disposal of any Assets held by or under such financial institution's, other entity's or person's control:

1. on behalf of, or for the benefit or use of, any Defendant;

2. in any account maintained in the name of, or subject to withdrawal by, any Defendant; or

3. that are subject to access or use by, or under the signatory power of, any Defendant.

B. Deny access to any Defendant to any safe deposit boxes, commercial mail boxes or storage facilities that are:

1. titled in the name, individually or jointly, of any Defendant;

2. subject to access by any Defendant; or

3. held for the beneficial interest of any Defendant.

C. Provide to the Receiver, within five (5) business days, a statement setting forth:

1. the identification of each account or asset titled in the name of, individually or jointly, or held on behalf of, or for the benefit or use of, any Defendant, whether in whole or in part, or to which any Defendant is a signatory;

2. the balance of each such account, or a description of the nature and value of such asset;

3. the identification of any safe deposit box, commercial mail box, or storage facility that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, any Defendant, whether in whole or in part;

4. if the account, safe deposit box, or other asset has been closed or removed, or more than $1,000 withdrawn or transferred from it within the last ninety (90) days, the date of the closure or removal of funds, the balance on said date, and the name and account number of the person or entity to whom such account, funds, or other asset was remitted; and

5. upon the request of the Receiver, such statement shall be accompanied by the account statement for every full or partial month the account has been open and by copies of: (i) every wire transfer statement for every wire transfer sent to or received by such account and (ii) all checks for more than One Thousand Dollars ($1,000.00 USD).

D. Allow the Receiver or its counsel to inspect and copy, or upon the Commission's or the

AmeriDebt Trustee's request, promptly provide the Commission's or the AmeriDebt Trustee's representatives with copies of, any records or other documents pertaining to any such account or asset, including but not limited to originals or copies of account applications, corporate resolutions, account statements, wire transfer applications or receipts, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit logs.

E. The Assets subject to this Paragraph include existing assets and assets deposited after the effective date of this Order. This Paragraph shall not prohibit transfers in accordance with provisos (2) and (3) that follow Paragraph I.C. of this Order, Paragraph IV.A. of this Order, or any further order of the Court.

X. NONINTERFERENCE WITH RECEIVER

IT IS FURTHER ORDERED that all clients and vendors of Defendants, creditors, and other persons, and all others acting on behalf of any such client, vendor, creditor or other persons, including sheriffs, marshals, other officers, deputies, servants, agents, employees, and attorneys, are stayed from:

A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against or affecting Defendants or any other part of the Receivership Property, except that such actions may be filed to toll any statutes of limitations;

B. Using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other

process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any portion of the Receivership Property, including, without limitation, any property owned by or in the possession of Defendants or the Receiver, wherever situated;

C. Attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement or other agreement with Defendants, or any entity controlled by Defendants, or otherwise affecting Receivership Property;

D. Doing any act to interfere with the taking control, possession, management, or sale by the Receiver, of any portion of the Receivership Property, or to in any way interfere with or harass the Receiver, or to interfere in any manner with the exclusive jurisdiction of the Court over the Receivership Property.

Provided, however, this provision shall not be construed to restrict:

1. The commencement or continuation of a criminal action or proceeding;

2. The commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power, including this action;

3. The enforcement of a judgment, other than a money judgment, obtained in an action

or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

4. The continuation of *In re AmeriDebt*, Case No. 04-23649-PM (Bankr. D. Md.), or the commencement and continuation of any suit or proceeding filed by the AmeriDebt Trustee; or

5. The continuation of *Polacsek, et al. v. Debticated Consumer Counseling, et al.*, Case No. 04-CV-00631-PJM (D. Md.).

XI. RECEIVER'S REPORTS

IT IS FURTHER ORDERED that:

A. Within ninety (90) days of its appointment as Receiver, or such longer time as the Court may approve, the Receiver shall file a preliminary inventory and estimate of value of all Receivership Property. The preliminary inventory may be filed under seal if, in the judgment of the Receiver, the public dissemination of the information contained therein might impede the Receiver's efforts to collect and marshal the Defendants' Assets.

B. Within thirty (30) days after the filing of the preliminary inventory, and at regular intervals of approximately three (3) months thereafter until discharged, the Receiver shall file reports of his acts and transactions in its official capacity as Receiver. These reports shall periodically update the preliminary inventory as new Receivership Property is identified and located.

XII. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order may be served upon Defendants by

electronic service upon their counsel through this Court's CM/ECF system; and also by facsimile transmission, personal service, overnight delivery, or U.S. Mail, by agents and employees of the FTC, the Receiver, or any state or federal enforcement agency or by private process server, on (1) Defendants or any of their agents or employees; (2) any Financial Institution, entity, or person that holds, controls, or maintains custody, or has held, controlled, or maintained custody of any account or Asset of Pukke or DebtWorks that is held, jointly or singly: (a) by them, (b) for their benefit, (c) in trust by or for them, individually or jointly, or (d) under their direct or indirect control; or (3) any other person or entity that may be subject to any provision of this Order.

XIII. MONITORING

IT IS FURTHER ORDERED that the Receiver and the FTC are granted leave, pursuant to Federal Rule of Civil Procedure 45, to subpoena documents immediately from any Financial Institution, account custodian, or other entity, including any Financial Institution, account custodian or other entity (1) listed in the accounting required pursuant to Paragraph II of this Order, (2) receiving repatriated Assets pursuant to Paragraph IV of this Order, (3) that has held Assets of Defendants since May 17, 2002, or (4) that is subject to Paragraph IX of this Order, concerning the nature, location, status, and extent of the Defendants' assets and compliance with this Order, and such financial institution, account custodian or other entity shall respond to such subpoena within five (5) business days after service.

XIV. AMERIDEBT TRUSTEE EXCLUSION

IT IS FURTHER ORDERED THAT:

A. This Order shall not be construed to impose substantive obligations on the AmeriDebt Trustee or to affect or include property of AmeriDebt's bankruptcy estate, as defined by 11 U.S.C. § 541; and

B. This order shall not be construed to freeze any Asset in the possession, custody or control of the AmeriDebt Trustee, or to restrict in any way his administration of AmeriDebt's bankruptcy estate or the disposition including liquidation of its property, including the bankruptcy estate's accounts with Financial Institutions and its debt management plans. The powers of the Receiver provided for in Paragraph VI shall not be construed as powers over the AmeriDebt Trustee. The AmeriDebt Trustee shall not be required to render account to the Receiver, to retain Assets, or to repatriate Assets under this order. The Trustee is free to institute such legal actions as he deems to be in the best interest of AmeriDebt's bankruptcy estate to determine any liability of Defendants Pukke and DebtWorks to the bankruptcy estate, and the filing and prosecution of such actions shall not be deemed to be interference under Paragraph X.

XV. CORRESPONDENCE WITH PLAINTIFF

For the purposes of this Order, all correspondence and pleadings to the Commission shall be addressed to:

Lucy Morris, Esq.
Federal Trade Commission
Via facsimile (202-326-3768) or email (lmorris@ftc.gov)

With confirmation via U.S. mail to:
600 Pennsylvania Ave., N.W., Room NJ-3158
Washington, D.C. 20580
(202) 326-3295 (voice)

XVI. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.*

IT IS SO ORDERED.

April 20, 2005
/s/ PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

* A written opinion setting forth the reasons for the Court's decision herein will follow.

ATTACHMENT A

Form of Consent to Release of Financial Records

I, _____, of the State of _____ in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation or other entity has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the Federal Trade Commission and to the Receiver appointed by the United States District Court for the District of Maryland in the matter of the Federal Trade Commission v. AmeriDebt, Inc. et al.; and to give evidence relevant thereto in such case, and this shall be irrevocable authority for so doing. This direction is intended to apply to the laws of countries other than the United States which restrict or prohibit the disclosure of bank information without the consent of the holder of the account, and shall be construed as consent with respect thereto, and the same shall apply to any of the bank accounts for which I may be a relevant principal. This consent form is being executed pursuant to court order.

Dated: _____, 2005

Signature: _____

Printed full name: _____

[Entered: July 27, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1429 (8:07-cv-02367-PJM)

ROB EVANS & ASSOCIATES, LLC, as Receiver over the Assets of Andris Pukke and DebtWorks, Inc.

Plaintiff – Appellee

v.

JEFFREY HOLIBAUGH

Defendant – Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Shedd and Senior Judge Alarcon.

For the Court

/s/ Patricia S. Connor, Clerk

15 U.S.C. § 52. Dissemination of false advertisements

(a) Unlawfulness

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement--

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

15 U.S.C. § 53 False advertisements; injunctions and restraining orders

(a) Power of Commission; jurisdiction of courts. Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any

person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions. Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper

under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

15 U.S.C. § 77v Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs.

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) Contumacy or refusal to obey subpena; contempt
In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or

resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

15 U.S.C. § 78aa Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

* * *

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1367 Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if – (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Establishment of the U.S. Circuit Courts of Appeals

March 3, 1891.

26 Stat. 826.

CHAP. 517. — An Act to establish circuits courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

. . .

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and

citizens of the United States citizens or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws as in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

No. 10-549

IN THE

Supreme Court of the United States

JEFFREY HOLIBAUGH,
Petitioner,

v.

ROBB EVANS & ASSOCIATES LLC,
AS RECEIVER OVER THE ASSETS OF
ANDRIS PUKKE AND DEBTWORKS, INC.,
Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LESLEY ANNE HAWES
Counsel of Record
GARY OWEN CARIS
MCKENNA LONG & ALDRIDGE LLP
300 South Grand Avenue, 14th Floor
Los Angeles, CA 90071
(213) 688-1000
lhawes@mckennalong.com

Attorneys for Respondent, Robb Evans & Associates LLC, Receiver

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the federal district court supervising a receivership in an action under the Federal Trade Commission Act have ancillary subject matter jurisdiction over a lawsuit filed by the Court-appointed Receiver to recover property of the receivership estate?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, respondent Robb Evans & Associates LLC as Receiver ("Receiver") over the assets of Andris Pukke and DebtWorks, Inc. hereby discloses that (a) there is no parent corporation of respondent Robb Evans & Associates LLC ("REA") in its capacity as a limited liability company or as Receiver, and (b) there is no publicly held corporation that holds 10% or more of the stock of respondent in either of such capacities.

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IN THE

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No. 10-549

JEFFREY HOLIBAUGH,
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Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH MORE THAN 100 YEARS OF U.S. SUPREME COURT PRECEDENT AND NUMEROUS DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Respondent Robb Evans & Associates LLC ("Receiver") was appointed as a federal equity receiver over the assets of Andris Pukke ("Pukke")

and DebtWorks, Inc. ("DebtWorks") in the action pending in the United States District Court for the District of Maryland ("District Court") entitled *Federal Trade Commission v. Ameridebt, Inc., et al.*, Case No. 03-3317 PJM ("FTC Action"). The Federal Trade Commission ("FTC") asserted that the defendants made "misrepresentations and deceptive omissions under the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41-58" and that they violated "the disclosure requirements under the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801(a) *et seq.*" *See Federal Trade Commission v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 560 (D. Md. 2005). The FTC sought the appointment of the Receiver as one of several items of relief appropriate under the provisions of 15 U.S.C. § 53(b) of the FTC Action authorizing the issuance of a permanent injunction "in proper cases." The District Court found that the power of the court to grant a permanent injunction included "the power to grant any ancillary relief necessary to accomplish complete justice" (*Federal Trade Commission v. Ameridebt, Inc.*, 373 F. Supp. 2d at 562) and appointed the Receiver as well as ordering an asset freeze and other relief. The District Court unquestionably had subject matter jurisdiction in the FTC Action based on federal question jurisdiction. 28 U.S.C. § 1331.[1]

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[1] Petitioner contends, without citation to the Fourth Circuit's opinion, that the Fourth Circuit's decision "concedes the absence of a statutory basis for the District Court's original jurisdiction." Petition for Writ of Certiorari ("Petn."), p. 10. The Fourth Circuit's decision acknowledges that the District Court had subject matter jurisdiction in the underlying FTC Action based on federal question jurisdiction under 28 U.S.C. § 1331 (*see* App. p. 6a ("REA was appointed by the district court in an action over which the district court had federal subject matter jurisdiction")) and held the District Court had ancillary subject matter

Pursuant to the powers and duties conferred on the Receiver under the Preliminary Injunction Order with Asset Freeze, Appointment of a Receiver, Repatriation of Assets, and Other Equitable Relief dated April 20, 2005 (the "Preliminary Injunction Order") (Petn. Appendix ("App.") pp. 63a - 87a) and the Stipulated Final Judgment and Permanent Injunction as to Defendants DebtWorks, Inc. and Andris Pukke (App. pp. 22a - 62a) (collectively the "Receivership Orders") in the FTC Action, the Receiver filed an action against Petitioner Jeffrey Holibaugh ("Holibaugh") in the District Court to collect amounts due under a promissory note executed by Holibaugh in favor of Infinity Resources Group, Inc., one of the receivership entities by the terms of the Receivership Orders.

Judgment was entered in favor of the Receiver against Petitioner Holibaugh for the outstanding balance due under the promissory note. Petitioner seeks review of the Fourth Circuit decision affirming the District Court's denial of Holibaugh's post-judgment motion to dismiss based on lack of subject matter jurisdiction. *Robb Evans & Associates LLC v. Holibaugh*, 608 F. 3d 359 (4th Cir. 2010) (App., pp. 1a-18a).

A long line of federal decisions holds that the federal district court in which a receivership is pending has ancillary subject matter jurisdiction over related actions filed by a receiver in that court where the district court properly has subject matter jurisdiction over the action in which the receiver was

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jurisdiction in the Receiver's related action which was filed against Holibaugh "in furtherance of its duty to marshal Pukke's assets" (*see* App. p. 6a).

appointed. *White v. Ewing*, 159 U.S. 36 (1895); *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, 577 (1899); *Sec. & Exch. Comm'n v. Investors Sec. Corp.*, 560 F.2d 561, 567 (3rd Cir. 1977); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822 (6th Cir. 1981); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010). None of the cases relied on by Petitioner to support review of the Fourth Circuit's decision in this case reach a contrary result or address this issue.

Petitioner cites three decisions of this Court in an attempt to raise a conflict in federal law to support review. However, *Peacock v. Thomas*, 516 U.S. 349 (1996), *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) and *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), do not involve the district court's exercise of ancillary subject matter jurisdiction over a lawsuit by a federal equity receiver filed in the receivership court. *Peacock v. Thomas*, 516 U.S. 349 (1996) recognized the continuing existence of ancillary subject matter jurisdiction but refused to extend such jurisdiction to a new lawsuit in federal district court by a party holding a federal judgment for violations of ERISA against a third party alleging alter ego liability for the judgment. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) held that the district court did not have jurisdiction to enforce a settlement which was recited on the record but which was not part of the stipulation and order dismissing the case, and where the court's order dismissing the case did not reserve jurisdiction to enforce the settlement. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545

U.S. 546 (2005) was a diversity case in which the Court held the district court could exercise supplemental jurisdiction over claims by additional plaintiffs as to which the amount in controversy was less than the minimum amount required in diversity cases, so long as at least one plaintiff met the required amount in controversy.[2]

The Fourth Circuit's decision here is consistent with the substantial line of receivership cases cited above which hold or recognize that the receivership court has ancillary jurisdiction over related lawsuits by the receiver. In the factually analogous case of *White v. Ewing*, 159 U.S. 36 (1895), this Court held that the district court in which a receiver was appointed over an insolvent corporation had ancillary jurisdiction to hear a subsequent suit filed by the court-appointed receiver in the same court for recovery of the outstanding amounts due the insolvent corporation under approximately 130 promissory notes from third party obligors, which were assets of the receivership estate. The Court explained:

> The receiver does not take his authority as an ordinary indorsee of the paper, and subject to the disability to sue in federal court, which attaches to such indorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. . . . . In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of

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[2] Petitioner implicitly recognizes the authority of the Court's prior decisions and the consistency of the Fourth Circuit decision with this Court's prior precedent when Petitioner suggests the Court should overrule its prior holdings in *White v. Ewing*, *Pope v. Louisville, New Albany & Chicago Ry. Co.*, and *Riehle v. Margolies*, 279 U.S. 218 (1929). Petn., pp. 11-12.

> which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction.

Id. *See also Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573 (1899) in which the Court stated:

> The circuit court undoubtedly had jurisdiction of this suit on the ground of diversity of citizenship, not only because that fact existed in respect of complainant and defendants, but because the suit was ancillary to those in which the receiver was appointed. When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested . . . . [Citations omitted.]

Id. at 577.

Pope arose in a unique procedural context following enactment of the Act of March 3, 1891, 26 Stat. 826: "If the decree of the circuit court of appeals was made final by the act of March 3, 1891, this appeal must be dismissed; and it was so made final if the jurisdiction of the circuit court depended entirely on diverse citizenship." *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. at 576. The Court concluded the appeal should be dismissed based on the finality of the lower court's ruling because jurisdiction was

based solely on diversity of citizenship. *See* Act of March 3, 1891, 26 Stat. 826, 828, Section 6 ("the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States") (App., pp. 100a - 101a). In reaching that determination, the Court described at length and upheld the doctrine of ancillary subject matter jurisdiction applicable to federal courts in federal receivership proceedings. Petitioner's characterization of the *Pope* decision is therefore inaccurate. *See* Petn., n. 2, p. 17.

Published decisions of the federal Courts of Appeal have consistently applied ancillary subject matter jurisdiction to hold that a federal district court may exercise subject matter jurisdiction over suits filed by a receiver in the court in which the receiver was appointed where the receiver is acting in furtherance of his powers and duties in the receivership case. *See Sec. & Exch. Comm'n v. Investors Sec. Corp.*, 560 F.2d 561, 567 (3rd Cir. 1977) (district court had ancillary jurisdiction over suit by receiver appointed in a civil enforcement action by the Securities and Exchange Commission to recover pledged securities constituting receivership assets); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010) (in an opinion issued shortly after the Fourth Circuit's decision in this case, the Fifth Circuit held the district court in which a receivership was pending in an action by the Commodities Futures Trading Commission had ancillary jurisdiction over the receiver's suit for imposition of an equitable lien on a condominium owned by a third party); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981) (district court in which the receiver was appointed had ancillary jurisdiction over actions

by the receiver in that court for recovery against third parties on a promissory note in favor of the receivership entity and over a turnover action against a bank to recover receivership assets); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973) (receivership court had ancillary jurisdiction over receiver's suit for constructive trust to recover properties from third parties); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (district court in which receiver was appointed had ancillary jurisdiction, now subsumed under the "supplemental" jurisdiction statute, 28 U.S.C. § 1367, over lawsuits filed by receiver against third parties to recover fraudulent transfers under Illinois state fraudulent transfer statute); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008) (district court in which receiver was appointed in action by the Securities and Exchange Commission properly directed the receiver to file suit in that court against third party investors for recovery of transfers under state fraudulent conveyance statutes, noting that, "[a]lthough the Receiver only filed suit under a California statute, we have subject matter jurisdiction because this proceeding is ancillary to the SEC enforcement action").

United States v. Franklin Nat'l Bank, 512 F.2d 245 (2d Cir. 1975), cited by Petitioner, is consistent with these authorities and in fact articulates the same rule regarding the receivership court's ancillary subject matter jurisdiction over actions brought by the receiver in that court. The Second Circuit held that the District Court for the Eastern District of New York did not have subject matter jurisdiction over a lawsuit filed by a federal receiver appointed in an action in the District Court for the *Southern* District of New York but expressly recognized that the District Court for the *Southern* District of New

York would have had subject matter jurisdiction over the receiver's suit under the ancillary jurisdiction doctrine had the suit been filed in that court. *United States v. Franklin Nat'l Bank*, 512 F.2d at 249. The district court in *Canut v. Lyons*, 450 F. Supp. 26 (C.D. Cal. 1977), also cited by Petitioner, recognized it had ancillary subject matter jurisdiction over subsequent suits by the receiver based on this Court's decision in *Pope* but concluded that ancillary jurisdiction was "discretionary" rather than "original," such that the court was not required to exercise jurisdiction over the receiver's suit. *Canut v. Lyons*, 450 F. Supp. at 30-32.[3]

II. THE LEGISLATIVE HISTORY OF 28 U.S.C. § 1367 DOES NOT SUPPORT AN INTENT TO ELIMINATE ANCILLARY SUBJECT MATTER JURISDICTION IN THESE CIRCUMSTANCES

The enactment of 28 U.S.C. § 1367 addressing "supplemental jurisdiction" of the federal district courts does not alter the rule established in the long line of judicial precedent cited above. If Congress intended to overrule *White v. Ewing*, 159 U.S. 36 (1895), *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, and the lower court decisions following those cases that confirm the ancillary subject matter jurisdiction of the receivership court over subsequent suits filed by receivers in that court, such

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[3] In any event, the portion of the *Pope* opinion quoted in *Canut* is incomplete, and the court in *Canut* misstates this Court's *dicta* regarding the application of ancillary jurisdiction in a federal receivership as well as the narrow holding of *Pope* on account of the finality of the lower court's dismissal order based on its finding of a lack of diversity of citizenship.

an intent would have been expressly stated in the legislative history. Instead, the legislative history cites this Court's decision in *Finley v. United States*, 490 U.S. 545 (1989) as "casting some doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction" and indicates that 28 U.S.C. § 1367 was enacted in part out of concern that the *Finley* decision would be applied to unduly restrict the district courts' exercise of supplemental jurisdiction. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990) § 114, *reprinted in* 16 *Moore's Federal Practice* 3d § 106 App.01, pp. 106 App.-1- 106 App.-2 (3d ed. rev. 2010) (Matthew Bender & Co.). "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). *See also Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103, 127 (2d Cir. 2001) and *Horton v. Reliance Std. Life Ins. Co.*, 141 F. 3d 1038, 1041 (11th Cir. 1998), both citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) indicating that statutes are enacted with a presumption that long-established and familiar common law principles are to be retained unless there is clear contrary legislative intent. Petitioner has cited no legislative history of 28 U.S.C. § 1367 that would support an intent to eliminate ancillary subject matter jurisdiction in the context of federal receivership proceedings articulated in the cited decisions.

III. PETITIONER MISCHARACTERIZES *DONELL* AND IGNORES OTHER CIRCUIT COURT DECISIONS ISSUED AFTER THE ENACTMENT OF THE SUPPLEMENTAL JURISDICTION STATUTE UPHOLDING ANCILLARY JURISDICTION OVER SUBSEQUENT RECEIVER SUITS

Petitioner inaccurately asserts that there was "an independent, statutory basis for subject matter jurisdiction in 15 U.S.C. §§ 77v(a), 78aa" for the claims brought by the receiver in *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). *See* Petn., p. 11, n.1. Those statutes applied to the underlying action for violations of the securities laws brought by the Securities and Exchange Commission in which the receiver (Donell) was appointed, just as the District Court in this case had original subject matter jurisdiction over the underlying FTC Action based on violations of the FTC Act and related federal statutes. The *Donell* case was a separate subsequent lawsuit filed by the federal equity receiver against third party "winning" investors based exclusively on state law fraudulent conveyance claims, seeking to recover funds paid to investors in excess of the amounts they invested in the receivership entity. The portion of *Donell* quoted by Petitioner states that the receiver was granted authority by the receivership court "to bring suits *under state law in federal court* under ancillary jurisdiction." *Donell v. Kowell*, 533 F.3d at 769 (emphasis added), cited at Petn. p. 17. *Donell* is *not* distinguishable from this case; it is *directly analogous* and supports the District Court's exercise of ancillary subject matter jurisdiction over the Receiver's claim against Holibaugh.

The Fifth and the Seventh Circuits have also issued published decisions after the 1990 enactment of 28 U.S.C. § 1367 which hold that the federal district court which appointed a receiver in civil enforcement actions by a federal regulatory agency had ancillary subject matter jurisdiction over actions filed by the receiver against third parties in connection with his receivership duties. *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (ancillary jurisdiction over lawsuits filed by receiver against third party to recover fraudulent transfer under Illinois state fraudulent transfer statute); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010) (ancillary subject matter jurisdiction over receiver's suit for imposition of an equitable lien).

CONCLUSION

There is no conflict on the issue presented between the Fourth Circuit's decision and this Court's decisions or the decisions of the United States Courts of Appeal. No departure from "accepted and usual course of judicial proceedings" occurred. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

LESLEY ANNE HAWES
Counsel of Record
GARY OWEN CARIS
MCKENNA LONG & ALDRIDGE LLP
300 South Grand Avenue, 14th Floor
Los Angeles, CA 90071
(213) 688-1000
lhawes@mckennalong.com

Attorneys for Respondent, Robb Evans & Associates LLC, Receiver